COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

ALASKA, PETITIONER,

vs.

ARCTIC MAID, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1960
CERTIORARI GRANTED OCTOBER 10, 1960

Nos. 15283-88

United States
Court of Appeals
for the Ninth Circuit

No. 15283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC.,
Appellants,

vs.

TERRITORY OF ALASKA,
Appellee.

No. 15284

PACIFIC REEFER and PACIFIC REEFER FISHERIES,
Appellants,

vs.

TERRITORY OF ALASKA,
Appellee.

No. 15285

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES,
Appellants,

vs.

TERRITORY OF ALASKA,
Appellee.

No. 15286

ALASKA REEFER and ALASKA REEFER FISHERIES,
Appellants,

vs.

TERRITORY OF ALASKA,
Appellee.

No. 15287

NORTH STAR and NORTH STAR FISHERIES,
Appellants.

vs.

TERRITORY OF ALASKA,
Appellee.

No. 15288

NORTHERN REEFER COMPANY; GRIMES PACKING COMPANY and REEFER II,
Appellants,

vs.

TERRITORY OF ALASKA,
Appellee.

Transcript of Record

Appeals from the District Court for the District of Alaska,
Division Number One

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Affidavit of Lula Nixon (No. 7143)..... 183

Amended Answers to Additional Interrogatory No. 1:

No. 7130—Pacific Queen Fisheries..... 125

No. 7132—North Star Fisheries..... 157

Amended Complaint (No. 7143)..... 172

Answers and Counterclaims:

No. 7093—Arctic Maid Fisheries..... 13

No. 7129—Pacific Reefer Fisheries..... 112

No. 7130—Pacific Queen Fisheries..... 126

No. 7131—Alaska Reefer Fisheries..... 140

No. 7132—North Star Fisheries..... 158

Answers to Plaintiff's Supplemental Interrogatories:

No. 7093—Arctic Maid Fisheries..... 10

No. 7129—Pacific Reefer Fisheries..... 110

No. 7130—Pacific Queen Fisheries..... 123

No. 7131—Alaska Reefer Fisheries..... 148

No. 7132—North Star Fisheries..... 154

Answers of Defendant Pacific Queen to Plaintiff's Supplemental Interrogatories and Answers to Additional Interrogatories (No. 7130) 123

Answers to Amended Complaint and Affirmative Defenses (No. 7143) 177

Appeal:

Bond for Costs on (7129) 118

Bond for Costs on (7130) 136

Bond for Costs on (7131) 149

Bond for Costs on (7132) 167

Bond for Costs on (7143) 185

Certificate of Clerk to Transcript of Record on 93

Notice of 89

Order Consolidating Actions on 6

Order Extending Time for Docketing Record on 92

Statement of Points Upon Which Appellants Will Rely on (USCA) 94

Stipulation re Supersedeas on Appeal (No. 7143) 186

Supersedeas and Cost Bond on (No. 7093) .. 90

Bonds for Costs on Appeal:

No. 7129—Pacific Reefer Fisheries 118

Bonds for Costs on Appeal—(Continued):
No. 7130—Pacific Queen Fisheries..... 136
No. 7131—Alaska Reefer Fisheries..... 149
No. 7132—North Star Fisheries..... 167
No. 7143—Northern Reefer et al..... 185
Certificate of Clerk to Transcript of Record... 93
Complaints:
No. 7093—Arctic Maid, etc..... 3
No. 7129—Pacific Reefer Fisheries..... 108
No. 7130—Pacific Queen, etc..... 121
No. 7131—Alaska Reefer, etc..... 138
No. 7132—North Star, etc..... 152
No. 7143—Northern Reefer et al..... 170
Interrogatory No. 4 of Interrogatories Proposed by Plaintiff (Nos. 7093, 7130, 7131, 7132, 7142, 7143, 7129)..... 7
Judgment (Nos. 7093, 7130, 7131, 7132, 7142, 7143, 7129) 87
Memorandum Re Admissibility of Evidence (Nos. 7093, 7130, 7131, 7132, 7142, 7143, 7129) 23
Motion for Reconsideration or in the Alternative for a New Trial (Nos. 7093, 7130, 7131, 7132, 7129) 81
Names and Addresses of Attorneys..... 1

Notice of Appeal (Nos. 7093, 7129, 7130, 7131, 7132, 7143) 89

Notice to Take Depositions (Nos. 7093, 7129, 7130, 7131, 7132, 7142, 7143)..... 11

Opinion of March 17, 1956 (Nos. 7093, 7129, 7130, 7131, 7132, 7142, 7143)..... 60

Opinion, Supplemental, May 25, 1956 (Nos. 7093, 7129, 7130, 7131, 7132, 7142, 7143)..... 82

Order Consolidating Actions (Nos. 7093, 7129, 7130, 7131, 7132, 7142, 7143)..... 6

Order Extending Time for Docketing Record on Appeal 92

Reply of Plaintiff to Alaska Reefer's Counterclaims (Nos. 7093, 7129, 7130, 7131, 7132, 7142, 7143) 8

Reply of Plaintiff to Arctic Maid's, Pacific Queen's and North Star's Counterclaims (Nos. 7093, 7129, 7130, 7131, 7132, 7142, 7143) 22

Statement of Points Upon Which Appellants Rely (USCA) 94

Stipulation Filed February 12, 1955 (No. 7143) 181

Stipulation No. 1, Defendant's (Nos. 7093, 7129-7132, inc., 7142-7143)..... 55

Exhibit 16—Number of Fish Purchased or Otherwise Obtained by Each Defendant for Years 1949 Through 1954..... 57

Stipulation No. 1, Defendant's—(Continued):

Exhibit 17—Number of Operating Units and Comparative Pack of Shore and Floating Canneries and Freezer Ships..... 57

Stipulation No. 2, Defendant's (No. 7143)..... 59

Stipulation No. 1, Plaintiff's (Nos. 7093, 7129-7132, inc., 7142-7143)..... 32

Exhibit 1—Description of Defendants' Vessels and Their Method of Operation..... 37

Exhibit 2—"Value of Raw Material" for Each Defendant for the Years 1951 Through 1954 44

Exhibit 3—Number of Employees, Inc. Crew Members and Independent Fishermen and Total Earnings for Years 1949 Through 1954 44

Exhibit 4—Number of Days Each Year That Freezer Ships Operated in Waters North of Dixon Entrance..... 45

Exhibit 5—Moneys Spent by Defendants for Purchase of Equipment, Fuel and Supplies in Alaska 45

Exhibit 6—Number of "Catcher" Boats Owned and Used..... 46

Exhibit 7—Statement of Tax Returns Filed and Taxes Paid for Years 1951 Through 1954 46

Stipulation No. 1, Plaintiff's—(Continued):

Exhibit 8—Taxes Paid to Taxing Jurisdictions Other Than Alaska on Account of Processing of Fish Caught or Purchased, etc. 47

Exhibit 9—Taxes, Penalty and Interest Claimed to Be Due by Territory of Alaska as of 11/1/55 48

Exhibit 10—Number of Freezer Ships and Land-Based Cold Storages Subject to Tax Imposed by Chap. 97 SLA 1949, etc. for Years 1949-1954 49

Exhibit 11—Statement of Taxes Imposed by Act Claimed to Be Due From Freezer Ships and Other Floating Cold Storages and Shore-Based Cold Storages, Years 1949-1954 and Statement of Amounts Collected 49

Exhibit 12 — Expenditures and Character Thereof, Made by All Depts. of Territorial Government in the Enforcement, etc. of Taxes Imposed for Years 1951 Through 10/1/55 50

Exhibit 13—General Ratio General and Administrative Expenses of Collections, etc. 1949-1951, 1951-1953 and 1953-1955..... 51

Exhibit 14—Receipts From Land-Based Cold Storages and Other Fish Processors Derived by the Territory From Taxes, etc.... 52

Stipulation No. 1, Plaintiff's—(Continued):

Exhibit 15—Alaska Dept. of Fisheries Allotment of Funds, Expenditures and Balances Since April 1, 1949-December 31, 1954....53-54

Stipulation re Supersedeas on Appeal (No. 7143) 186

Supersedeas and Cost Bond on Appeal (No. 7093) 90

Transcript of Proceedings and Testimony..... 189

Exhibits for Plaintiff:

1—Expenditures and Character Thereof, Made by All Depts. of Territorial Government in Enforcement, etc. of Taxes Imposed for 1951 Through 10/1/55.... 50
Admitted in Evidence..... 288

2—General Ratio General and Administrative Expenses of Collections, etc. 1949-1951, 1951-1953 and 1953-1955..... 51
Admitted in Evidence..... 288

3—Receipts From Land-Based Cold Storages and Other Fish Processors Derived by the Territory From Taxes, etc..... 52
Admitted in Evidence..... 292

4—Affidavit of Frank W. Hynes..... 350

5—Affidavit of Edward S. Marvich..... 352

Transcript of Proceedings—(Continued):

Witnesses:

George, Wallis (Deposition)
—direct 246, 323, 328
—cross 335
—redirect 342
—recross 344

Kyros, Homer
—direct 260
—cross 265
—recalled, direct 363
—cross 365

Parke, Thomas Sidney (Deposition)
—Examination 251, 276

Pinkerton, James G.
—direct 231
—cross 237
—redirect 245

	Original	Print
Proceedings in the United States Court of Appeals for the Ninth Circuit	377	377
Minute entry of argument and submission, January 13, 1958	377	377
Minute entry of order directing filing of opinion and filing and recording of judgment	378	377
Order granting petition for rehearing	379	378
Order calendaring rehearing en banc	380	378
Minute entry of argument and submission, December 7, 1959	381	379
Minute entry of order directing filing of opinion and filing and recording of judgment	382	380
Opinion, Hamley, J.	383	380
Judgments	396	393
Clerk's certificate (omitted in printing)	402	398
Order allowing certiorari	403	399

In the District Court for the District of Alaska
Division Number One, at Juneau

No. 7093-A

TERRITORY OF ALASKA, Plaintiff,

vs.

"ARCTIC MAID" and ARCTIC MAID FISHERIES, INC., Defendant.

COMPLAINT

Comes now, the Plaintiff, and for its cause of action against the Defendant alleges:

I.

That the Territory of Alaska is a sovereign incorporated Territory organized under the laws of the United States.

II.

That the said Defendant, during the years 1952 and 1953, failed to pay taxes due and owing Territory of Alaska.

III.

That by reason of the foregoing, Defendant owes Plaintiff the sum of $5,429.31, the same being taxes due the Plaintiff under the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951.

IV.

That Defendant, through wilful neglect, has failed to remit such tax when due, therefore there

is now due and owing to Plaintiff, in addition to the amount of such tax, the sum of $201.29, the same being a statutory penalty.

V.

That by reason of the fact that said tax was not paid when due, although demands have been made of the Defendant for the same, it is delinquent, and there is now due and owing to the Plaintiff, in addition to said tax and penalty:

(a) The sum of $306.35 representing interest on said tax at the rate of 6% per annum, accrued from the due date, January 15, 1953 to July 15, 1954, together with,

(b) interest on said taxes at the same rate from and after July 15, 1954, until paid.

VI.

That the total sum now due and owing Plaintiff from Defendant is $5,936.95, together with interest at 6% per annum on the sum of $5,429.31 from and after July 15, 1954, until paid.

VII.

That all conditions precedent necessary to the commencement of this action and to the fixing of Defendant's liability for such taxes, interest and penalties, have been performed by Plaintiff or have occurred.

Wherefore, Plaintiff prays that the court enter herein a decree as follows:

1. That Plaintiff have judgment against the Defendant for the total sum of $5,936.95 with interest on $5,429.31 at 6% per annum from July 15, 1954, until paid.

2. For a reasonable attorney's fee and the costs of this action.

3. For such other and further relief as to the court may seem meet and just.

Dated at Juneau, Alaska, this 12th day of July, 1954.

J. GERALD WILLIAMS,
Attorney General
/s/ By EDWARD A. MERDES,
Assistant Attorney General

Duly Verified.

[Endorsed]: Filed July 14, 1954.

In the District Court for the District of Alaska
Division Number One, at Juneau

No. 7093-A

Territory of Alaska, Plaintiff, v. Arctic Maid and Arctic Maid Fisheries, Inc., Defendants.

No. 7130-A

Territory of Alaska, Plaintiff, v. "Pacific Queen" and Pacific Queen Fisheries, Defendants.

No. 7131-A

Territory of Alaska, Plaintiff, v. Alaska Reefer Fisheries, Defendant.

No. 7132-A

Territory of Alaska, Plaintiff, v. "North Star" and North Star Fisheries, Defendants.

No. 7142-A

Territory of Alaska, Plaintiff, v. American Packing Co.; Pacific Reefer Fisheries, a partnership consisting of John Breskovich, Robert Breskovich, Helen Breskovich, Joseph Rosin and John Joncich; and Pacific Reefer (a vessel), Defendants.

No. 7143-A

Territory of Alaska, Plaintiff, v. Northern Reefer Company; Grimes Packing Company; and Reefer II (a vessel), Defendants.

No. 7129-A

Territory of Alaska, Plaintiff, v. Pacific Reefer Fisheries, Defendant.

ORDER CONSOLIDATING ACTIONS

The motion of the plaintiff dated January 3, 1955 for the consolidation of the above-entitled actions having been heard and granted by the above-entitled

court on January 7, 1955 and the court being fully advised in the premises,

It is hereby ordered that said actions be and hereby are, consolidated.

Dated at Juneau, Alaska, this 13th day of January, 1955.

/s/ GEORGE W. FOLTA,
United States District Judge

[Endorsed]: Filed January 13, 1955.

[Title of District Court and Causes Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7142-A, 7143-A, 7129-A]

INTERROGATORIES TO DEFENDANTS PROPOUNDED BY PLAINTIFF

To Each and Every One of the Above Named Defendants:

* * * * *

No. 4. State the specific number and pounds of salmon caught by your "catcher" or other boats, in the calendar years 1949 through 1954:

(a) "within" a distance of three miles from the mean low tide mark on the coastline of Alaska.

(b) "without" a distance of three miles from the mean low tide mark on the coastline of Alaska.

(Break down your figures by the year and state the amount caught within and without during each specified year.)

* * * * *

Dated at Juneau, Alaska, this 23rd day of August, 1955.

J. GERALD WILLIAMS,
Attorney General

/s/ By EDWARD A. MERDES,
Assistant Attorney General

Receipt of Copy Acknowledged.

[Endorsed]: Filed August 23, 1955.

[Title of District Court and Causes Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7142-A, 7143-A, 7129-A]

PLAINTIFF'S REPLY TO ALASKA REEFER'S COUNTERCLAIMS

Comes now, the plaintiff and replies to Alaska Reefer's counterclaims as follows:

Reply to First Counterclaim

I.

As to paragraph #1 of defendant, Alaska Reefer's First counterclaim, plaintiff denies each and every allegation contained therein save and except admissions of defendant incorporated therein by reference.

II.

As to paragraph #1 of defendant, Alaska Reefer's first counterclaim, plaintiff denies each and every allegation contained therein except that on

or about 31 March 1954, defendant Alaska Reefer paid, to plaintiff, the sum of $2,155.07 in part payment of its liabilities resulting from taxes levied under Chapter 97 SLA 1949 as amended and also $25.00 for each year 1951 through 1953, but plaintiff denies that said sum or any part thereof was paid under protest.

Reply to Second Counterclaim

I.

As to paragraph #1 of defendant, Alaska Reefer's second counterclaim, plaintiff denies each and every allegation contained therein save and except admissions of defendant incorporated therein by reference.

II.

As to paragraph #1 of defendant, Alaska Reefer's second counterclaim, plaintiff denies each and every allegation contained therein except that on or about 31 March, 1954 defendant, Alaska Reefer, paid to plaintiff the sum of $2,155.07 in part payment of its liability resulting from taxes levied under Chapter 97 SLA 1949 as amended and also $25.00 for each year 1951 through 1953, but plaintiff denies that said sum or any part thereof was paid under protest.

Wherefore, defendant prays as follows:

(1) Defendant's counterclaims be dismissed.

(2) Plaintiff be allowed costs, attorney fees, and such other relief as to the Court may seem just.

J. GERALD WILLIAMS,
Attorney General

/s/ By EDWARD A. MERDES,
Assistant Attorney General

[Endorsed]: Filed August 24, 1955.

[Title of District Court and Cause No. 7093-A.]

DEFENDANT'S ANSWERS TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES

Now comes defendant by Gale Blasingame, its Secretary-Treasurer, who, having been duly sworn, in response to the interrogatories served upon defendant in the above case, makes the following answers:

No. 1:

Washington Business and Occupation Tax

1952	$ 727.38
1953	681.46
1954	1,516.05

Seattle Business License Tax

1952	$ 242.47
1953	221.27
1954	505.35

Nos. 2, 3:

Alaska Business License Tax, Chapter 97, SLA

1949, as amended, paid to Department of Taxation, Juneau

1952 tax (paid January, 1953)	$797.08
1953 tax (paid January, 1954)	987.69
1954 tax (paid May, 1954)	25.00

No. 4: Defendant has no records which would enable it to answer this question, but believes that salmon were caught both within and without a distance of three miles from mean low tide mark on the coastline of Alaska.

/s/ GALE BLASINGAME,
Secretary-Treasurer

Subscribed and sworn to before me this 2nd day of September, 1955.

[Seal] /s/ BILL J. FARMER,
Notary Public in and for the State of Washington, residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 7, 1955.

[Title of District Court and Causes Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7142-A, 7143-A, 7129-A]

NOTICE TO TAKE DEPOSITION

To: John H. Dimond, Attorney for Defendants, P. O. Box 366, Juneau, Alaska.

Please take notice that at 9:00 A.M., on the 28th day of October 1955, at room 427 Alaska Office

Building, Juneau, Alaska, the plaintiff in the above-entitled action will, upon oral examination pursuant to the FRCP, take the deposition of:

(1) Thomas S. Parke, as a witness of the plaintiff, whose address is 544 Pine Street, Juneau, Alaska,

(2) Clarence L. Anderson, a witness of the plaintiff, whose address is 204 Behrends Avenue, Juneau, Alaska, and

(3) Wallis George, witness of the plaintiff, whose address is 703 Baranof Hotel, Juneau, Alaska,

before Patricia L. Wood, a notary public, or before some other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed. You are invited to attend and cross examine.

Dated at Juneau, Alaska, this 11th day of October, 1955.

J. GERALD WILLIAMS,
Attorney General

/s/ By EDWARD A. MERDES,
Attorney for Plaintiff

Acknowledgment of Service Attached.

[Endorsed]: Filed October 11, 1955.

[Title of District Court and Cause No. 7093-A.]

ANSWER AND COUNTER-CLAIM OF DEFENDANT ARCTIC MAID FISHERIES, INC.

Defendant, Arctic Maid, Fisheries, Inc., answers plaintiff's complaint, as follows:

First Defense

I.

Answering paragraph I of the complaint, defendant admits the same.

II.

Answering paragraph II of the complaint defendant denies that during the tax years 1952 and 1953, or either of them, defendant failed to pay taxes to the Territory of Alaska.

III.

Answering paragraph III of the complaint defendant denies that it owes the plaintiff the sum of $5,429.31, or any other amount whatever, for taxes due for the tax years 1952 and 1953, or either of them, under the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1952.

IV.

Answering paragraph IV of the complaint defendant denies that it has through wilful neglect failed to remit such tax and denies that there is

due, as penalty or otherwise, the sum of $201.29, or any other amount whatever.

V.

Answering paragraph V of the complaint, defendant denies each and every allegation therein contained.

VI.

Answering paragraph VI of the complaint defendant denies that there is now due and owing from it to plaintiff the sum of $5,936.95, or any other amount whatsoever.

VII.

Answering paragraph VII of the complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

Second Defense

I.

Defendant alleges that it is a corporation organized and existing under the laws of Washington and that it is not qualified to do business in the Territory of Alaska.

II.

Defendant alleges that it owns and operates the Diesel Electric Vessel "Arctic Maid", a vessel registered under the laws of the United States under No. 263888 at the Port of Seattle, Washington; that it purchased the vessel in 1951; that it has a large investment in the same; that it expended further

sums in converting the vessel for use as a "freezer ship", primarily for employment in the freezing and transportation of salmon obtained on the high seas off the coast of Alaska.

III.

Defendant alleges that, except as hereinafter specifically set forth, its operations were confined to Bristol Bay, where the salmon obtained by the D/V Arctic Maid were caught by smaller gas-operated "catcher" boats having a maximum length of thirty-two feet and an approximate breadth of ten feet, that in 1952 all the "catcher" boats which delivered salmon to the D/V Arctic Maid were owned by and operated for the defendant; that in 1953 four additional "catcher" boats owned by private individuals, sold and delivered fish to the D/V Arctic Maid: that the "catcher" boats employ the "gill-net" method of catching salmon; that the salmon caught by the said "catcher" boats in the years 1952 and 1953 have been taken partly within a line drawn parallel to and at a distance of 3 miles from the mean low tide mark on the coastline of Alaska, and partly outside that line; that all fish obtained by the D/V Arctic Maid in Bristol Bay were obtained while the D/V Arctic Maid was seaward of a line drawn parallel to and at a distance of 3 miles from the mean low tide mark on the coastline of Alaska; that in obtaining such fish the D/V Arctic Maid was operating on the high seas and outside the territorial jurisdiction of Alaska.

IV.

Defendant further alleges that salmon were obtained by the D/V Arctic Maid elsewhere than in the Bristol Bay area, and in the manner set forth in paragraph III above, only as follows: that during the fall of 1952 and 1953 the D/V Arctic Maid proceeded to the area of Southeastern Alaska, where 13,150 chum salmon were purchased from independent fishermen in 1952 for the sum of $9,102.66 and 48,704 chum salmon were purchased from independent fishermen in 1953 for the sum of $34,938.07; that in 1953, 5339 salmon were purchased already frozen from the Petersburg Cold Storage Company; that at the close of the 1953 Bristol Bay season, 51,430 salmon were purchased from various sources in the Kodiak area for the sum of $19,446.52; that during operations in Kodiak and in Southeastern Alaska the D/V Arctic Maid did obtain fish at points within three miles of the coastline of Alaska.

V.

Defendant further alleges that the salmon loaded aboard the D/V Arctic Maid were frozen aboard the vessel to preserve them for transportation to the State of Washington where during the tax years of 1952 and 1953 they were to be and have been canned and sold for further resale in interstate commerce.

VI.

Defendant further alleges that its operations for its fiscal year, which included the 1952 tax year, resulted in a net profit of $2,467.98; that its opera-

tions for the fiscal year including the 1953 tax year resulted in a net loss of $42,172.84.

VII.

Defendant alleges that the plaintiff is seeking to apply the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, to activities of the defendant which are beyond the taxing jurisdiction of the Territory of Alaska in violation of Sections 3 and 9 of the Organic Act, 48 U.S.C.A. §§ 24 and 77, 37 Stat. 512, 514, as amended, and the due process clause of the Fifth and Fourteenth Amendments to the Constitution.

Third Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the activities of the defendant, would abridge, impair and deny to defendant the right to take or preserve fish in waters in which fishing is permitted by the Secretary of the Interior, in violation of Section 1 of the Act of June 6, 1924, 48 U.S.C.A. 222, 43 Stat. 464, as amended, and Section 3 of the Organic Act, 48 U.S.C.A. 24, 37 Stat. 512, as amended.

Fourth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the operation of the defendant's D/V Arctic Maid is invalid and unconstitutional in that it imposes an undue burden on, and discriminates against interstate commerce, and is an attempted regulation of interstate commerce, all in violation of Article 1, Section 8 of the Federal Constitution.

Fifth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951 unreasonably and arbitrarily discriminates against freezer ships and floating cold storages in favor of shore based cold storages, which classification and discrimination is without reasonable justification, in violation of the Equal Protection, Due Process and Privi-

leges and Immunities Clauses of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution and Section 9 of the Organic Act, 48 U.S.C.A. 78, 37 Stat. 514, as amended.

Sixth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, is arbitrary, oppressive and confiscatory, and constitutes an attempted taking of its valuable property and denial of its right to fish and preserve fish, all in violation of the Due Process Clause of the Fifth and Fourteenth Amendments.

First Counter-Claim

I.

Defendant repeats and by this reference incorporates herein each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that heretofore, to-wit, on Jan-

uary 15, 1953, it paid to the plaintiff through its agent, the Tax Commissioner, under protest, the sum of $772.08 on account of taxes for the year 1952 under Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951; that heretofore, to-wit, on the 15th day of January, 1954, it paid to the plaintiff, through its agent, the Tax Commissioner, under protest, the sum of $987.69 for the tax year 1953, under the said tax, and that the defendant had theretofore paid under protest an initial license fee of $25.00 for each of the years 1952 and 1953; that no part of the sums so paid were due and owing to the plaintiff and the defendant is therefore entitled to a refund in the amount of $1,809.77, together with interest thereon from the date of payment, under the provisions of Section 48-7-1, A.C.L.A. 1949.

Second Counter-Claim

I.

Defendant repeats and by reference incorporates herein each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that heretofore, to-wit, on the 15th day of January, 1953, it paid to the plaintiff through its agent, the Tax Commissioner, the sum of $772.08; that on the 15th day of January, 1954, it paid to the plaintiff through its agent, the Tax Commissioner, the sum of $987.69; that it had theretofore paid an initial license fee of $25.00 for

each of the years 1952 and 1953; that the sums so paid in the total amount of $1,809.77 were an overpayment through error of the tax, if any, legally imposed under Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, and defendant is therefore entitled to a refund in the amount of such overpayment as the court may find to have been made, with interest from the date of payment under the provisions of Section 48-7-1, A.C.L.A. 1949.

Wherefore, having fully answered, defendant prays as follows:

1. That the plaintiff's complaint herein be dismissed;

2. That defendant recover judgment on its counter-claims against the plaintiff in the sum of $1,809.77 or such smaller amount as the court may find to be due, with interest from the respective dates of payment;

3. For defendant's costs and attorneys' fees; and

4. For such other and further relief as to this court may appear meet and just.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ JOHN H. DIMOND,
Attorneys for Defendant

Service and receipt of copy acknowledged this 17th day of October, 1955.

[Endorsed]: Filed Oct. 17, 1955.

[Title of District Court and Causes Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7142-A, 7143-A, 7129-A]

PLAINTIFF'S REPLY TO ARCTIC MAID'S, PACIFIC QUEEN'S AND NORTH STAR'S COUNTERCLAIMS

Comes now, the plaintiff and replies to said counterclaims as follows:

Reply to First Counterclaim

I.

As to paragraph #1 of said defendant's First counterclaim, plaintiff denies each and every allegation contained therein save and except admissions of defendants incorporated therein by reference.

II.

As to paragraph #2 of said defendant's First counterclaim, plaintiff denies each and every allegation contained therein.

Reply to Second Counterclaim

I.

As to paragraph #1 of said defendant's Second counterclaim, plaintiff denies each and every allegation contained therein save and except admissions of defendants incorporated therein by reference.

II.

As to paragraph #2 of said defendant's Second

counterclaim, plaintiff denies each and every allegation contained therein.

Wherefore, plaintiff prays as follows:

(1) Defendant's counterclaims be dismissed.

(2) Plaintiff be allowed costs, attorney fees, and such other relief as to the Court may seem just.

Dated at Juneau, Alaska this 27th day of Oct., 1955.

J. GERALD WILLIAMS,
Attorney General,

/s/ By EDWARD A. MERDES,
Assistant Attorney General

Receipt of Copy Acknowledged.

[Endorsed]: Filed Oct. 27, 1955.

[Title of District Court and Causes Nos. 7093-A, 7131-A, 7142-A, 7129-A, 7130-A, 7132-A, 7143-A]

MEMORANDUM RE ADMISSIBILITY OF EVIDENCE

Memorandum re Validity of Territorial Statutes Relating to Conservation of the Fishery Resources of Alaska

Facts

Chapter 68, Session Laws of Alaska 1949, an act of the Alaska Legislature approved on March 21, 1949, is entitled:

"An Act to create a Territorial Fisheries Department, establishing a Board with authority to take appropriate steps to improve Alaska's fisheries, including authority to register floating equipment and other fishing gear and promulgate rules and regulations; defining offenses and prescribing penalties; making an appropriation; and declaring an emergency."

Section 1 of the Act creates an Alaska Department of Fisheries to carry out these purposes:

(a) To assist in conservation of Alaska's fisheries by appropriate measures, including steps to overcome the present depleted condition of the salmon runs.

(b) To foster the ownership, management and control of fishing equipment and gear by residents of Alaska.

(c) To cooperate with the United States Fish and Wildlife Service.

Under Section 3 of the Act an Alaska Fisheries Board is created, and its powers and duties are described in Section 7, as follows:

(a) The Board shall have the power to determine and promulgate reasonable rules and regulations governing all persons engaged in the business of catching fish in the Territorial waters of Alaska; provided, however, that such rules and regulations shall not be in derogation of restrictions imposed by the United States Fish and Wildlife Service, but constitute additional safeguards for preservation and improvement of Alaska's fisheries. The Board may require the registration of all floating equip-

ment and other gear used in catching fish in said waters of Alaska; provided, that the Board may not require any fee for such registration in derogation of license privileges granted under other law.

(b) The Board shall have the power to police the fisheries on its own initiative or in cooperation with the United States Fish and Wildlife Services, and shall have the power to enforce its regulations.

(c) The Board is empowered to investigate matters pertaining to the fisheries for fact-finding purposes or with respect to violations of applicable laws or regulations, and for said purposes may subpoena witnesses, require the production of records and take other appropriate steps.

(d) The Board is charged with the duty of maintaining, improving and extending the fisheries resources of Alaska in the interest of the economy and general well-being of Alaska.

(e) In furtherance of its broader purposes, the Board may engage in stream clearance, hatchery and re-stocking projects and biological studies, alone or in collaboration with the United States Fish and Wildlife Service.

(f) On Alaska's assuming Statehood, the Board shall assume all the powers now vested in the Fish and Wildlife Service relating to the regulation and conservation of the fisheries of Alaska.

Finally, Section 8 imposes criminal penalties on any person "violating any rule, regulation or registration requirement promulgated by the Board under the authority of this Act * * *"; and to carry

out the "purposes of this Act" the Legislature, in Section 10, appropriated the sum of $250,000.00.

In addition to this appropriation, the Legislature, in subsequent sessions, appropriated the following amounts for the Alaska Department of Fisheries:

Chapter 134 SLA 1951	$409,672.00
Chapter 141 SLA 1953	510,402.00
Chapter 6 SLA 1955 (Extra-ordinary Session)	672,790.00

Questions Presented

1. Whether Chapter 68 SLA 1949 is a valid Act of the Territorial Legislature.

2. Whether the legislative appropriations made in aid of and to carry out the purposes of Chapter 68 SLA 1949, constitute valid expenditures of public funds.

Argument

1. Chapter 68 SLA 1949 Contravenes the Alaska Organic Act and Is, Therefore, Invalid.

The Congressional delegation to Alaska of legislative power extending to "all rightful subjects of legislation" (Alaska Organic Act, Section 9, 48 USCA Sec. 77), would appear, at first glance, to encompass the enactment of suitable legislation for the conservation and propagation of the Territory's commercial fishery resources, but there is a limitation on this grant of power, that is, that a subject of legislation be "not inconsistent with the Constitution and laws of the United States." (48 USCA Sec. 77) Moreover, there is a further limitation on

legislative action contained in Section 3 of the Organic Act (48 USCA Sec. 24), this section reading as follows:

The authority granted to the legislature by section 23 of this title to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game, fish, and fur seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to sections 41, 47, 161-169, and 322-325 of this title. This provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.

The Territory, therefore, in spite of the broad grant of legislative power, cannot alter, amend, modify or repeal "fish laws" of the United States. And since Congress has passed, and there has been in existence for many years, a comprehensive statute for the protection and complete regulation of Alaska's fisheries (White Act, 48 USCA Sec. 221 et seq.) the ultimate decision to be made here is whether Chapter 68 does constitute an attempt by the Territory of Alaska to alter, amend, modify or repeal such laws, contrary to Section 3 of the Organic Act. If it is in practical effect an attempt by the Territory to regulate the fisheries, a power which the Territory does not possess, then the Act would be invalid. See P. E. Harris Co. v. Mullaney, 87 F. Supp. 248, 12 Alaska Reports 476 (1949).

In 1923 the Alaska Legislature enacted Chapter

95, the expressed purpose of which was "to supplement the fish laws of the United States applicable to Alaska; to conserve the salmon supply of Alaska; to provide for closed seasons for salmon fishing." This Act made it unlawful to take salmon for commercial purposes, except by trollers, in certain areas and between certain dates each year, and imposed criminal penalties for violation.

In the case of Auk Bay Salmon Co. v. U. S., CA-9, 1924, 300 F. 907, 5 Alaska Fed. Reports 237, the Court of Appeals for the Ninth Circuit held this statute invalid as amending and altering existing "fish laws" in contravention of Sec. 3 of the Organic Act. The court said this:

"The inhibition against amendment, alteration, etc., of the fish laws must stand by itself, and be construed according to its plain terms. We see no escape from the conclusion that to make the changes in those laws which were attempted to be made by the territorial Legislature was to alter, amend, and to some extent repeal the acts of Congress relating to the same subject, and was within the prohibition of the Organic Act. To extend the period of the closed season, to enlarge the area affected by it, and to increase the penalties for violation of the fishing regulations, was to amend and alter the existing law. This conclusion is not obviated by the declaration therein contained that the statute shall not be construed as in any wise to alter, amend, modify, or repeal any of the fish laws, and that its purpose is only to provide for further and additional regulations for additional protection to the salmon and

insure a future supply thereof, and it is not ground for holding otherwise that the alterations and amendments did in fact result only in greater protection to the fish and were in the interests of and operated to the welfare of the inhabitants of Alaska. The question is what is, and not what ought to be, the law."

Chapter 68 SLA 1949 is no less offensive. In this Act the announced purposes are "to assist in conservation of Alaska's fisheries by appropriate measures, including steps to overcome the present depleted condition of the salmon runs, and to foster the ownership, management and control of fishing equipment and gear by residents of Alaska"; and the Alaska Fisheries Board is expressly authorized and empowered "to take appropriate steps to improve Alaska's fisheries; to determine and promulgate reasonable rules and regulations governing all persons engaged in the business of catching fish in the Territorial waters of Alaska;" which shall "constitute additional safeguards for preservation and improvement of Alaska's fisheries"; "to require the registration of all floating equipment and other gear used in catching fish in said waters "of Alaska * * * "; and the Board is charged with the duty of "maintaining, improving and extending the fishery resources of Alaska in the interest of the economy and general well-being of Alaska." Furthermore, any violation of a "rule, regulation or registration requirement promulgated by the Board" constitutes a crime, punishable by a fine not to exceed $1,000.00.

The expressed purposes of this Act and the pow-

ers delegated to the Alaska Fisheries Board encompass the identical field already comprehensively covered by Congress in the White Act, which statute is, in the true sense of the term, one of the "fish laws" of the United States. There is, then, no escape from the conclusion that the Legislature has done nothing more than to attempt to alter, amend, modify or repeal existing federal laws relating to Alaska's fisheries. Chapter 68 is, therefore, in effect an attempt by the Territorial Legislature to regulate the fisheries of Alaska, in contravention of the Alaska Organic Act and is, therefore, invalid. Auk Bay Salmon Co. v. U. S., supra.

2. Appropriations Made by the Alaska Legislation to Carry Out the Purposes of Chapter 68 SLA 1949 Are Likewise Invalid.

The principle is probably inherent in the nature of our government that the powers of taxation, and of appropriation, can be validly exercised only for a public purpose. And there being no express limitation in the Organic Act on the subject of appropriations, the delegation of legislative power " to extend to all rightful subjects of legislation" would appear to include full power to appropriate public monies for whatever purposes, truly public in nature, that the Legislature deemed necessary or appropriate.

But in spite of this undoubted right, appropriations and expenditures must be for proper governmental purposes, and such are not justified for purposes that are not within the power of the Territorial Legislature. It may be called a "public" purpose to expend funds to conserve Alaska's fisheries,

since it can be argued that proper conservation is for the ultimate benefit of all of the people of Alaska; but it is not "public" in the true sense of the term, that is, a purpose or object which is the right and duty of the Territorial government to assist by monies raised from the people of Alaska by taxation. Cf Loan Assn. v. Topeka, 87 U. S. (20 Wall) 655, 661.

Here there is absent such a right or duty, for as pointed out above, Chapter 68 is nothing more than a statutory plan to regulate and control the fisheries of Alaska, a matter beyond the powers delegated to the Territory by Congress. The appropriation made by Chapter 68 to carry out the purposes of that Act, and subsequent appropriations made for the Alaska Department of Fisheries in 1951, 1953 and 1955, are but parts of this invalid plan. Thus, the Territory, under pretext of executing a broad power of appropriation for public purposes, has passed laws for the accomplishment of objectives not entrusted to the Legislature. Such appropriations are, therefore, but means to an invalid end. See U. S. v. Butler, 297 U. S. 1, 69, 72-73; McCullough v. Maryland, 4 Wheat. 316, 423. One may paraphrase the language of the United States Supreme Court in Linder v. U. S., 268 U. S. 5, 17, and say this:

"The Territorial Legislature cannot, under the pretext of executing delegated powers, pass laws for the accomplishment of objects not entrusted to the Territorial government. And we accept as established doctrine that any provision of an act of the

Legislature ostensibly enacted under power granted by Congress, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to Congress, is invalid and cannot be enforced."

Conclusion

For the reasons stated, it is submitted that Chapter 68 Session Laws of Alaska 1949 is invalid as contravening Sec. 3 of the Alaska Organic Act, and that the appropriation made to carry out the purposes of that Act, and subsequent appropriations made by the Alaska Legislature for the use of the Alaska Department of Fisheries, are likewise invalid.

Dated: October 31, 1955.

/s/ JOHN H. DIMOND

[Endorsed]: Filed Nov. 8, 1955.

[Title of District Court and Causes Nos. 7093-A, 7131-A, 7142-A, 7129-A, 7130-A, 7132-A, 7143-A.]

PLAINTIFF'S STIPULATION No. 1

It is stipulated by the undersigned that the following enumerated facts shall constitute the basis for the Court's determination of the issues raised by the pleadings herein: that such facts may be considered as evidence introduced at the trial of the

above entitled actions, provided, however, that each party hereto shall have the right to object to the introduction in evidence of any part or parts thereof on grounds of relevancy; and that each party hereto shall have the right, at the trial of these actions, to present by any competent means proof of other and additional facts, as to which other parties hereto reserve the right to make and present appropriate objections on any and all recognized and legitimate grounds.

Facts

1. A description of the "freezer ships and other floating cold storages", within the meaning of that phrase as used in Chapter 97 Session Laws of Alaska 1949, as amended by Chapter 116 Session Laws of Alaska 1951 (hereinafter referred to as the "Act"), and the details of their operations, are contained in Exhibit No. 1, hereto annexed and made a part hereof.

2. The "value of the raw material", within the meaning of Section 1(b) of the Act, for each of the defendants for the tax years 1951, 1952, 1953 and 1954, is as stated in Exhibit No. 2, hereto attached.

3. Exhibit No. 3, hereto attached, contains a statement of the following with respect to operations by the defendants, for the years 1949 through 1954, in the waters North of Dixon Entrance, i.e., 54 deg. 40 min. North latitude:

The number of employees, including crew members and independent fishermen, directly employed by each defendant in each annual operation, and

their total earnings broken down on a yearly basis.

4. A statement of the number of days that the freezer ships of the defendants operated in the waters North of Dixon Entrance each year from 1949 through 1954 is contained in Exhibit No. 4, hereto attached.

5. A statement of moneys spent by each defendant for purchases of equipment, fuel and supplies and repairs of equipment in the Territory of Alaska for the years 1949 through 1954 is contained in Exhibit No. 5, hereto attached.

6. A statement of the number of "catcher" boats owned by each defendant and used for fishing in the waters North of Dixon Entrance for the years 1949 through 1954 is contained in Exhibit No. 6, hereto attached.

7. A statement of when returns were filed and taxes paid by each defendant under the Act for the years 1951 through 1954 is contained in Exhibit No. 7, hereto attached. (Note: None of the defendants filed returns or paid taxes under the Act for any year prior to 1951 with the exception of Pacific Queen which paid as taxes the sum of $1,230.59 for 1949 and $561.41 for 1950).

8. A statement of taxes paid by each defendant to taxing jurisdictions other than Alaska on account of the processing of fish caught or purchased in the waters North of Dixon Entrance is contained in Exhibit No. 8, hereto attached.

9. A statement of the taxes, interest and penalty claimed to be due by the Territory of Alaska under the Act, based upon the "value of the raw mate-

rial" as contained in Exhibit No. 2, and upon the record of returns filed and taxes paid under the Act as shown in Paragraph 7, hereof, and Exhibit No. 7, is contained in Exhibit No. 9, hereto attached.

10. A statement of the total number of freezer ships or other floating cold storages which were subject to the tax imposed by the Act for the years 1949 through 1954 is contained in Exhibit No. 10, hereto attached.

11. A statement of the total amount of taxes imposed by the Act and claimed to be due from all freezer ships and other floating cold storages, and from all shore-based cold storages, respectively, for each of the years 1949 through 1954, and a statement of the amounts of taxes collected by the Territory of Alaska for each of such years from each of the two classes, is contained in Exhibit No. 11, hereto attached.

12. Exhibit No. 12, hereto attached, contains a statement of expenditures, and character thereof, made by all departments of the Territorial government in the enforcement, collection or attempted collection of the tax imposed by the Act from freezer ships and other floating cold storages for the years 1951 through October 1, 1955.

13. Exhibit No. 13 contains the following:

(a) A statement of the general ratio of administrative expenses of collection and enforcement of Territorial taxes to Territorial revenue for the bienniums 1949-1951, 1951-1953 and 1953-1955.

(b) A statement of the general ratio of administrative expense of collection and enforcement of

taxes imposed by the Act with respect to freezer ships and other floating cold storages and the actual taxes collected from such freezer ships and other floating cold storages.

(c) A statement as to whether the administrative expense of enforcement and collection of the tax imposed upon land-based cold storages and other land-based fish processors, subject to the provisions of the Act, is the same, or a greater or lesser ratio to receipts therefrom.

14. Exhibit No. 14, hereto attached, contains a statement of the amount of receipts from land-based cold storages and other fish processors subject to the provisions of the Act derived by the Territory from taxes other than those imposed by the Act.

15. A statement of the expenditures made from purely Territorial funds made in connection with the conservation, preservation, or propagation of ocean salmon fishing for each of the years 1949 through 1954 is contained in Exhibit No. 15, hereto attached. (This information furnished by Alaska Department of Fisheries. Cost of Sports-Fishing program not included.)

Dated: November 8, 1955.

J. GERALD WILLIAMS,
Attorney General,
/s/ By EDWARD A. MERDES,
Assistant Attorney General,
Attorney for Plaintiff

/s/ By JOHN H. DIMOND,
Attorney for Defendants

EXHIBIT 1

Description of Defendants' Vessels and Their Method of Operation

Defendants are the owners and operators of certain vessels hereinafter referred to as "freezer ships," Appendix 1 to this Exhibit gives details with respect to the registration, number, port of registry, date of acquisition by the defendants, and measurements and capacities of the vessels. These vessels have been converted and equipped with refrigerating facilities particularly adapted for the operations hereinafter described.

The freezer ships themselves are not equipped to and do not engage in any fishing. The fish loaded aboard the defendants' vessels are obtained in one of two possible ways:

1. By purchase from independent fishermen; or

2. By the operation of "catcher" boats owned and operated by the defendants, or under contractual arrangement between the defendants and the owners of such boats.

The "catcher" boats operated by or under contractual arrangement with the defendants are of a general type commonly known as "Bristol Bay gillnetters," shallow-draft vessels powered by inboard gas engines. The gillnetters are thirty to thirty-two feet in length, approximately ten feet abeam and have an approximate draft of two feet. In most instances these boats are transported from and returned to Puget Sound aboard the freezer

ships. In some cases they have been stored ashore in the Bristol Bay area.

The gillnetters are manned by fishermen—two to each boat—employed each season by the defendants under the terms of current Bristol Bay Agreement between the salmon industry and the Alaska Fishermen's Union, and the special addendum to that contract applicable to freezer ships. In broad outline, the terms of employment of the fishermen provide that the defendants supply the gillnet boat and all gear, pay the current seasonal price for all salmon caught and landed aboard the defendants' vessels by the fishermen, provide food and quarters aboard the "mother ship," pay "run money" in the amount of $234.00 per man, furnish air transportation in one direction if desired by the fisherman, and provide fuel for the operation of the gillnetter.

The operations of the defendants' vessels may be considered as falling into two classes; operations during the Bristol Bay red salmon season, and all other operations.

During the Bristol Bay red salmon season the defendants' vessels anchor seaward of a line drawn parallel to and at a distance of three miles from mean low tide mark on the shore of Bristol Bay and serve as a base for the operations of their gillnet "catcher" boats. The movement of the vessels from one area in Bristol Bay to another is regulated by the Fish & Wildlife Service.

The defendants' vessels remain in excess of three miles seaward of mean low tide mark most of the

time during the Bristol Bay red salmon season for the following reasons:

The operations of the gillnet "catcher" boats, which are themselves of shallow draft, take place between the freezer ships and the shore and during the open days of the red salmon season a very considerable number of gillnetters will be traversing the water between shore and the larger vessels. The freezer ships must maintain a reasonably straight line so that their anchors will not foul or impede the operation of the gillnet boats in the area in which the salmon are caught, and at a considerable distance from shore to give the catcher boats fishing room. The gillnet boats themselves do operate shoreward of three miles from the low tide mark and in extremely shallow waters and fish inside such a line.

The gillnet boats leave the freezer ships at the beginning of each open period during the fishing season and proceed to the fishing areas inshore of the freezer ships, traversing in a generally north and south direction along the easterly shore of Bristol Bay, searching for fish. At the conclusion of each open period, or when the capacity of the gillnet boat is reached, or when the fishermen manning the gillnet boat wish for any other reason to discontinue fishing, the gillnetter returns to the freezer ship and the fish are transferred to the "mother" ship. The method by which the transfer is accomplished is as follows:

A boom is swung out over the side of the freezer

ship on which is rigged a "brailer" or net, which is lowered to the deck of the gillnetter. The gillnet fishermen then throw their salmon catch into that net and as they do so the fish are tallied by the crew of the freezer ship. The fishermen's pay is based upon the number of fish so tallied. The brailer is then hoisted aboard the freezer ship and the salmon are dumped into quick-freezing brine tanks.

During some of the years 1951, 1952 and 1953 some of the defendants operated their vessels at other times or in other areas than during the Bristol Bay red salmon season, such as the Bristol Bay King salmon season, and in the Kodiak, Cook Inlet, or Southeastern Alaska areas. During these operations, as distinguished from Bristol Bay Red salmon season operations, the defendants' vessels were operated at points closer to the shore than three miles, and did obtain fish while so positioned. Appendix 2 to this Exhibit sets forth the number of fish obtained by the defendants for freezing during those operations in which defendants' vessels were anchored from time to time within three miles of mean low tide mark on the coastline of Alaska, and all of such fish were caught within three miles of mean low tide mark on the coastline of Alaska.

With the one exception hereinafter stated, the defendants used the "quick-freezing brine tank" method of freezing. When fish are to be frozen, a solution of sea water and salt having a salinity of approximately 86 per cent is pumped into brine tanks permanently installed aboard the vessels. The

temperature of this solution is lowered by refrigeration to 10° to 15° Fahrenheit. Brine is used because the freezing point of brine having this salinity is in the vicinity of 0° to 2° Fahrenheit. The freezing begins when the fish are dumped into the brine and continues over a period of ten to twelve hours in which the brine in the tank is constantly changed and circulated. At the end of ten to twelve hours the temperature of the fish has been lowered to 12° to 15° and they are fully frozen. At this time traps in the bottom of the brine tanks are opened and by means of shutes the salmon are directed into the refrigerated holds where they are stored until discharged at destination on Puget Sound. The brine tanks themselves are sometimes used for the storage of fish when the storage capacity of the fore and after holds has been fully utilized. Ordinarily in such cases the brine is pumped overboard and the tank is used as a dry frozen storage compartment, but on occasion the brine has been permitted to remain in the tank and the fish are carried frozen in the brine. During the 1951 season the freezing method employed aboard the vessel Pacific Queen was the so-called "air-blast" method in which the fish are placed in racks after being loaded aboard the freezer ship, and set into a freezing compartment and subjected to blasts of air at a sub-freezing temperature until fully frozen.

At the conclusion of their operations in waters north of Dixon's Entrance the defendants' vessels returned to Puget Sound and discharged their fish.

During the years 1951, 1952 and 1953 all fish frozen aboard the defendants' vessels, with the exception of five hundred pounds of red salmon marketed frozen by Alaska Reefer Fisheries in the year 1952, were canned by the defendants prior to further resale.

The corporate defendant, Arctic Maid Fisheries, Inc., is a Washington corporation not qualified to do business in Alaska. The partnership defendants have no co-partners who are residents of the Territory of Alaska; all co-partners are residents either of the State of Washington or of the State of California and all are citizens of the United States.

APPENDIX 1 to Exhibit 1

Description of Defendants' Vessels

Name	Registry No	Port of Registry	Length	Depth	Net Tons	Date Purchased
Alaska Reefer	261816	Tacoma	174.1'	18.9'	546	1950
Arctic Maid	263888	Seattle	173.8'	19.7'	541	1951
North Star	261698	Tacoma	215.3'	19.9'	1116	1951
Pacific Queen	257731	Tacoma	173.0'	18.8'	672	1948
Pacific Reefer	263890	Tacoma	175.8'	18.0'	389	1952

APPENDIX 2

to Exhibit 1

Number of Fish Obtained by the Defendants for Freezing During Those Operations in which Defendants' vessels were Anchored From Time to Time Within Three Miles of Mean Low Tide Mark on the Coastline of Alaska, ~~which Fish were Caught within Three Miles of Mean Low Tide Mark on the Coastline of Alaska~~

	1949	1950	1951	1952	1953	1954
ALASKA REEFER			5,210			45,095
ARCTIC MAID				13,150	105,583	47,767
PACIFIC QUEEN	11,197	10,831	1,368	340	9,331	4,186
NORTH STAR			11,530	85,193	133,559	116,479
PACIFIC REEFER						26,010
AMERICAN PACKING CO.						
NORTHERN REEFER						
GRIMES PACKING CO.						

Exhibit No. 2

"Value of Raw Material" for Each Defendant for the Years 1951 through 1954

	1951	1952	1953	1954	Total
Arctic Maid	$	$117,865.57	$142,800.12	$181,440.74	$442,106.43
Alaska Reefer	80,518.26	98,702.77	80,267.47	87,356.49	346,874.99
Pacific Reefer		83,113.84	86,458.39	96,853.56	266,425.79
Pacific Queen	69,403.25	95,790.11	88,795.93	84,009.00	337,998.29
North Star	79,860.46	216,076.58	208,532.87	173,239.89	677,709.80
American Packing Co.		191,559.86		82,127.14	273,687.00
Northern Reefer				64,757.32	64,757.32
Grimes Packing Co.		69,855.47			69,855.47
Totals	$229,781.97	$872,964.20	$606,854.78	$769,814.14	$2,479,415.09

Exhibit No. 3

Crew Members and
Number of Employees, Including Independent Fishermen, Directly Employed By Each Defendant And Their Total Earnings For Each Of The Years 1949 through 1954

	1949		1950		1951		1952		1953		1954	
	No. Employed	Total Earnings	No. Employed	Total Earnings	No. Employed	Total Earnings	No. Employed	Total Earnings	No. Employed	Total Earnings	No. Employed	Total Earnings
Arctic Maid		$		$		$	48	$ 95,144.47	45	$ 75,131.47	43	$111,241.23
Alaska Reefer					32	88,558.83	36	100,007.99	37	64,701.17	54	88,698.60
Pacific Queen	32	85,284.48	25	74,674.78	27	67,980.82	31	96,162.97	36	73,860.14	32	72,883.59
North Star					36	76,597.60	47	133,763.48	60	150,787.77	60	149,209.06
American Packing							30	91,721.38			30	44,356.39
Northern Reefer											Did not answer	
Grimes Packing							Did not answer					
Total	32	$85,284.48	25	$74,674.78	95	$233,137.25	192	$536,800.29	178	$364,480.55	219	$466,388.87

Exhibit No. 4

Number of days each year that freezer ships operated in waters North of Dixon Entrance

	1949	1950	1951	1952	1953	1954	Total
Arctic Maid				45	62	61	171
Alaska Reefer			60	45	45	63	213
Pacific Reefer				43	43	65	151
Pacific Queen	54	52	63	45	46	55	315
North Star			50	54	56	63	223
American Packing Co.				25		23	48
Northern Reefer							
Grimes Packing Co.							
Totals	54	52	173	260	252	330	1,121

Exhibit No. 5

Moneys spent by defendants for purchase of equipment, fuel and supplies in Alaska

	1949	1950	1951	1952	1953	1954	Totals
Arctic Maid						$1,540.93	$1,540.93
Alaska Reefer					$ 373.80	1,175.00	1,548.80
Pacific Reefer				$4,089.55	38.65	1,593.79	5,721.99
Pacific Queen	$1,207.60	$1,256.85		124.80	371.60		2,960.85
North Star					4,139.07	1,235.99	5,375.06
American Packing Co.				None		None	
Northern Reefer							
Grimes Packing Co.							
Totals	$1,207.60	$1,256.85		$4,214.35	$4,923.12	$5,545.71	$17,147.63

Exhibit No. 6

Number of "catcher" boats owned and used by defendants for fishing in waters North of Dixon Entrance

	1949	1950	1951	1952	1953	1954
Arctic Maid				13	13	13
Alaska Reefer			10	12	14	13
Pacific Reefer				12	14	13
Pacific Queen	7	7	7	10	12	11
North Star			11	17	23	23
American Packing Co.				10		10
Northern Reefer						
Grimes Packing Co.						
Totals	7	7	28	74	76	83

Exhibit No. 7

Statement of Date Tax Returns Filed & Taxes Paid by each Defendant under the Act for the years 1951 through 1954

	1951		1952		1953		1954		
	Date Filed	Tax Paid	Date Filed	Tax Paid	Date Filed	Tax Paid	Date Filed	Tax Paid	Total Tax Paid
Arctic Maid		$	1/19/53	$ 797.08	1/19/54	$1,012.69	1/15/55	$ 25.00**	$1,834.77
Alaska Reefer	5/10/54	834.00	5/10/54	994.97	5/10/54	451.10	1/15/55	25.00**	2,305.07
Pacific Reefer			None	25.00**	None	None*	1/15/55	25.00**	50.00
Pacific Queen	1/30/52	444.46	1/15/53	604.93	5/18/54	1,832.35	1/15/55	None*	2,881.74
North Star	1/30/52	448.47	1/15/53	1,309.94	None	25.00**	1/14/55	None*	1,783.41
American Packing			None	None*			1/15/55	25.00**	25.00
Northern Reefer							1/20/55	25.00**	25.00
Grimes Packing			None	25.00**					25.00
Total Tax Paid		$1,726.93		$3,756.92		$3,321.14		$125.00	$8,929.99

*No Territorial License to do Business in Alaska
**License Fee Only

Exhibit No. 8

Taxes paid by each defendant to taxing jurisdictions other than Alaska on account of the processing of fish caught or purchased in the waters North of Dixon Entrance.

	1949	1950	1951	1952	1953	1954	Total
	$	$	$	$	$	$	$
Washington Business and Occupation Tax							
Arctic Maid				727.38	681.46	1,516.05	2,924.89
Alaska Reefer			63.98	940.27	1,025.42	667.05	2,696.72
Pacific Reefer				289.66	453.77	1,535.00	2,278.43
Pacific Queen	1,058.11	7.42	5.15	1,263.56	403.90	391.66	3,129.80
North Star			11.59	1,298.13	1,923.12	1,513.88	4,746.72
American Packing Co.							
Northern Reefer							
Grimes Packing Co.			49.85	154.92	76.48	28.18	309.43
Total	$1,058.11	$7.42	$130.57	$4,673.92	$4,564.15	$5,651.82	$16,085.99
Seattle Business License Tax							
Arctic Maid				242.47	221.27	505.35	969.09
Alaska Reefer							
Pacific Reefer							
Pacific Queen		211.22	424.00	220.20	39.62	12.00	907.04
North Star			6.57	172.97	130.86	6.43	316.83
American Packing Co.							
Northern Reefer							
Grimes Packing Co.							
Total		$211.22	$430.57	$635.64	$ 391.75	$ 523.78	$ 2,192.96
Grand Total	$1,058.11	$ 218.64	$ 561.14	$5,309.56	$ 4,955.90	$ 6,175.60	$ 18,278.95

1951-54, 1,058.11 / 218.64 — 1,276.75 / 17,002.20

Exhibit No. 9

TAXES, PENALTY & INTEREST, AS OF 11/1/55, CLAIMED TO BE DUE BY THE TERRITORY OF ALASKA FROM EACH OF THE DEFENDANTS

	Taxes	Interest to 11/1/55	Penalty	Total
Aretic Maid				
1952**	$ 3,809.01	$ 638.97	229.05	4,677.03
1953**	3,749.13	404.19	238.19	4,391.44
1954***	7,232.63	344.49	0	7,577.12
TOTAL	14,790.77	1,387.58	467.24	16,645.59
Alaska Reefer				
1951****	2,500.79	681.58	827.45	4,009.82
1952*	3,003.14	575.95	980.78	4,559.87
1953*	2,749.60	303.85	793.93	3,847.38
1954*	3,470.46	164.70	---	3,635.16
TOTAL	11,723.99	1,726.08	2,602.16	16,052.23
Pacific Reefer				
1952**	6,339.19	1,062.64	1,584.80	8,986.63
1953*	3,458.34	371.63	864.59	4,694.56
1954***	4,106.49	195.59	---	4,302.08
TOTAL	13,904.02	1,629.86	2,449.39	17,983.27
Pacific Queen				
1951*	2,331.67	531.40	137.56	3,000.63
1952*	3,226.67	540.34	----	3,767.01
1953*	1,719.49	222.07	881.71	2,823.27
1954*	3,360.36	159.48	----	3,519.84
TOTAL	10,638.19	1,453.29	1,019.27	13,110.75
North Star				
1951*	2,576.42	587.07	149.99	3,313.48
1952*	5,902.26	991.74	---	6,914.00
1953*	6,743.16	784.62	1,685.79	9,213.57
1954***	6,492.58	309.38	---	6,804.96
TOTAL	21,714.42	2,672.81	1,835.78	26,186.01
American Packing				
1952****	7,662.39	1,283.14	1,915.60	10,861.13
1954*	3,260.08	155.28	---	3,415.36
TOTAL	10,922.47	1,438.42	1,915.60	14,276.49
Northern Reefer				
1954**	2,565.29	122.18	128.26	2,815.73
Grimes Packing				
1952**	2,769.22	464.20	692.31	3,925.73
GRAND TOTALS	89,051.37	10,834.42	11,110.01	110,995.80

*Figures Computed from Defendant's Answer to Interrogatory No. 22
**Figures Computed from Fish & Wildlife Figures
***Figures Computed from Return Submitted by Defendant
****Figures Computed from "Value of Raw Material" Figure Submitted by J.Dimond

Exhibit No. 10

Number of freezer ships and land-based cold storages subject to tax imposed by Chapter 97 SLA 1949, as amended by Chapter 116 SLA 1951 for years 1949 through 1954

	1949	1950	1951	1952	1953	1954
Freezer ships and other floating cold storages	6	4	12	14	9	13
shore-based cold storages	10	10	10	10	10	11

Exhibit No. 11

Statement of taxes imposed by Act claimed to be due from all freezer ships and other floating cold storages, and from all shore-based cold storages, respectively, for each of the years 1949 through 1954, and a statement of amounts of taxes collected by the Territory for each of such years from each of the two classes.

	1949	1950	1951	1952	1953	1954	Total
Taxes claimed to be due							
~~ezer ships and other oating cold storages~~	$ 18.91	$ 1,016.08	~~12,415.39 $12,359.92~~	~~43,082.58 $41,563.19~~	~~21,710.22 $18,586.72~~	~~32,189.70 $31,755.68~~	~~109,832.98 $105,300.50~~
-based cold storages	-- --	-- --	2,014.53	2,000.00	2,000.00	-- --	6,014.53
Taxes Collected							
ezer ships and other oating cold storages	1,499.96	896.87	5,298.71	5,910.94	3,720.34	849.05	18,175.87
-based cold storages	68,318.67	102,138.58	74,176.95	66,400.97	58,505.84	75,566.36	445,107.37

Exhibit No. 12

Expenditures, & Character thereof, over & above routine office expenses, made by all departments of the Territorial Government in the enforcement, collection or attempted collection of the tax imposed by the Frozen Ships & other Floating Cold Storages for each of the years 1951 through 10/1/55.

Expenditures made by Department of Taxation:

	Travel & Per Diem	Office Expenses	Total
1951	$ 175.68	$ 130.61	$ 306.29
1952	192.60	233.28	425.88
1953	539.40	998.86	1,538.26
1954	126.61	426.50	553.11
1955	703.76	260.00	963.76
Totals	$ 1,738.05	$ 2,049.25	$ 3,787.30

Objection sustained

Separate extraordinary expenditures made by the Department of Taxation and Attorney General's Office in connection with bringing suit and obtaining service of process for collection of the tax:

	Travel & Per Diem	Office Expenses	Total
1954	$ 1,294.95	$ 2,685.06	$ 3,980.01
1955		3,740.03	3,740.03
Totals	$ 1,294.95	$ 6,425.09	$ 7,720.04
Grand Total	$ 3,033.00	$ 8,624.34	$ 11,657.34

Exhibit No. 13

(a) General ratio general and administrative expenses of collection and enforcement of territorial taxes to territorial revenue for the bienniums 1949-1951, 1951-1953 and 1953-1955:

1949-1951 3.30 cents for each dollar collected
1951-1953 3.28 cents for each dollar collected
1953-1955 3.1 cents for each dollar collected

(b) General ratio of administrative expense of enforcement and collection of taxes imposed by the Act with respect to Freezer Ships and other Floating Cold Storages and the actual taxes collected from such Freezer Ships and other Floating Cold Storages:

			Taxes Collected
1951	9.07	cents for each dollar collected	$ 5,298.71
1952	10.546	cents for each dollar collected	5,910.94
1953	44.73	cents for each dollar collected	3,720.34
1954	537.0	cents for each dollar collected	849.05

Refunded

(c) Statement as to whether the administrative expense of enforcement and collection of the tax imposed upon land-based Cold Storages and other Land-Based Fish Processors, subject to the provisions of the Act, is the same, or a greater or lesser ratio to receipts therefrom:

Land-Based Cold Storages have given the Tax Department no particular tax collection difficulties; no suits were filed against them and they have paid their taxes when due. Thus it can be assumed that the cost of collection taxes from Land-Based Cold Storages is as follows:

1949-1951 3.30 cents for each dollar collected
1951-1953 3.28 cents for each dollar collected
1953-1955 3.1 cents for each dollar collected

Exhibit No. 14

Receipts from Land-Based Cold Storages and other Fish Processors derived by the Territory from taxes other than those imposed by the Act

	1949	1950	1951	1952	1953	1954	Total
Corporation Income Tax	$ 18,479.66	$ 26,064.16	$ 45,616.91	$ 12,876.83	$ 4,087.28	$ 10,895.23	$ 118,020.07
Territorial Property Tax (These figures do not include municipal excise and ad valorem taxes which average approx. 10 mills.)	8,000.93	4,031.42	2,919.54	450.10			15,401.99
Estimated amount to be collected as a result of favorable court decision on validity of property tax	1,000.00	5,126.85	5,926.78	8,785.31			20,838.94
Estimated Taxes Paid To Incorporated Cities	52,119.00	52,119.00	52,119.00	52,119.00	52,119.00	52,119.00	312,714.00
Raw Fish Taxes Paid By Land-Based Canneries under Chapter 82	1,409,041.61	1,421,377.15	2,067,561.74	1,997,629.96	1,552,313.86	1,714,120.51	10,162,044.83
Grand Totals	$1,488,641.20	$1,508,718.58	$2,174,143.97	$2,071,861.20	$1,608,520.14	$1,777,134.74	$10,629,019.83

Exhibit No. 16

ALASKA DEPARTMENT OF FISHERIES ALLOTMENT OF FUNDS, EXPENDITURES AND BALANCES SINCE APRIL 1, 1949 - DECEMBER 31, 1954

Chapter 66, S.L.A. - approved March 21, 1949
Funds allotted April 1, 1949 - March 31, 1951 . . . . . $250,000.00

	Expenditure		Balance June 30, 1954	
Fisheries Board	$ 6,578.11			
Administration	46,187.93			
Biology	55,275.38			
Inspection	51,806.13			
Watershed Management and Stream Improvement	90,152.45	$250,000.00	None	None

(Last voucher charged against this account on June 28, 1954)

Funds allotted Biennium April 1, 1951 - March 31, 1953

Expenses of Board	$ 10,000.00
Administration	48,200.00
Biology	121,300.00
Watershed Management & Stream Imprvt.	59,200.00
Inspection	120,000.00
Federal Old Age Tax	972.00
Predator Control	50,000.00
	$409,672.00

	Allotted biennium April 1, 1951 - March 31, 1953		Expenditures		December 31, 1954 Balances	
FISHERIES BOARD	$ 10,000.00	$ 10,000.00	$ 7,236.44	$ 7,236.44	$ 2,763.56	$ 2,763.56
ADMINISTRATION						
Salary of Director	20,000.00		20,000.00			
Other Salaries & Extra Help.	12,000.00		11,683.00		317.00	
Other Expense of Administration.	16,200.00	48,200.00	15,227.22	46,910.22	972.78	1,289.78
BIOLOGY						
Salaries & Wages	62,730.00		62,377.69		352.31	
Other Expense of Biology	58,570.00	121,300.00	58,339.68	120,717.37	230.32	582.63
WATERSHED MANAGEMENT (Stream Improvement)						
Salaries & Wages	19,200.00		19,017.50		182.50	
Other Expense of Watershed Management.	40,000.00	59,200.00	36,097.92	55,115.42	3,902.08	4,084.58
INSPECTION						
Salaries & Wages	79,570.00		75,604.04		3,965.96	
Other Expense of Inspection.	40,430.00	120,000.00	36,522.59	112,126.63	3,907.41	7,873.37
PREDATOR CONTROL	50,000.00	50,000.00	50,000.00	50,000.00	None	None
(Last voucher charged against this account was October 27, 1954)						
FUND FOR PAYMENT OF F.O.A. TAX ON EMPLOYEES WAGES	972.00	972.00	972.00	972.00	None	None
		$409,672.00		$393,078.08		$16,593.92

Exhibit No. 15

Funds allotted biennium April 1, 1953 - March 31, 1955

Expenses of Board	$ 7,500.00
Administration	60,800.00
Biology	145,700.00
Watershed Management	45,000.00
Inspection	110,430.00
Destruction of Hair Seal, etc.	50,000.00
F.I.C.A.	972.00
	$420,402.00

	Allotted Biennium April 1, 1953 - March 31, 1955		Expenditures		Balance December 31, 1954	
EXPENSES OF BOARD	$ 7,500.00	$ 7,500.00	$ 6,440.62	$ 6,440.62	$ 1,059.38	$ 1,059.38
ADMINISTRATION						
Director's Salar	22,000.00		19,249.94		2,750.06	
Salary of Personnel	17,000.00		13,568.56		3,431.44	
General Expenses	21,800.00	60,800.00	16,124.43	48,942.93	5,675.57	11,857.07
BIOLOGY						
Salaries	80,700.00		69,531.00		11,169.00	
General Expenses	65,000.00	145,700.00	61,079.99	130,610.99	3,920.01	15,089.01
WATERSHED MANAGEMENT						
Salaries	25,000.00		21,445.83		3,554.17	
General Expenses	20,000.00	45,000.00	17,294.62	38,740.45	2,705.38	6,259.55
INSPECTION						
Salaries	70,000.00		66,722.24		3,277.76	
General Expenses	40,430.00	110,430.00	32,129.67	98,851.91	8,300.33	11,578.09
DESTRUCTION OF HAIR SEALS, ETC.	50,000.00	50,000.00	49,543.92	49,543.92	456.08	456.08
F.I.C.A.	972.00	972.00	972.00	972.00	None	None
		$420,402.00		$374,102.82		$46,299.18 (Balance period ending March 31, 1955)

Balance of allotted funds $1,080,074.00 Total Expenditures $1,017,180.90 $62,893.10 Total balances for periods ending March 31, 1953 and March 31, 1955

[Endorsed]: Filed Nov. 8, 1955.

[Title of District Court and Causes Nos. 7093-A, 7131-A, 7142-A, 7129-A, 7130-A, 7132-A, 7143-A.]

DEFENDANTS' STIPULATION No. 1

It is stipulated by the undersigned that the following additional facts shall also constitute the basis for the Court's determination of the issues raised by the pleadings herein: that such facts may be considered as evidence introduced at the trial of the above entitled actions, provided, however, that each party hereto shall have the right to object to the introduction in evidence of any part or parts thereof on grounds of relevancy; and that each party hereto shall have the right, at the trial of these actions, to present by any competent means proof of other and additional facts, as to which other parties hereto reserve the right to make and present appropriate objections on any and all recognized and legitimate grounds.

Facts

1. A tabulation of the number of fish purchased or otherwise obtained by the defendants in each of the years 1949 thru 1954 is contained in Exhibit No. 16, hereto annexed and made a part hereof.

2. A tabulation showing the number of units, and the comparative pack for shore canneries, floating canneries and freezer ships for the years 1949 to 1954 is shown in Exhibit No. 17, hereto annexed and made a part hereof. The freezer ship figures

include all salmon canned elsewhere than in Alaska but do not include salmon frozen aboard freezer ships which were later canned in the Territory of Alaska. The pack figures are given in units of cases of forty-eight (48) one pound cans.

Dated at Ketchikan, Alaska, this 7th day of November, 1955.

J. GERALD WILLIAMS
Attorney General

/s/ By EDWARD A. MERDES
Assistant Attorney General
Attorney for Plaintiff

/s/ By JOHN H. DIMOND
Attorney for Defendants

EXHIBIT # 16.

EXHIBIT # 16

NUMBER OF FISH PURCHASED OR OTHERWISE OBTAINED BY EACH DEFENDANT FOR YEARS 1949 THRU 1954

	1949	1950	1951	1952	1953	1954
Arctic Maid				161,085	191,409	260,126
Alaska Reefer			113,591	149,425	85,799	146,280
Pacific Reefer				111,980	109,720	129,804
Pacific Queen	79,392	111,222	79,763	138,822	97,220	102,170
North Star			111,811	304,203	299,886	299,599
American Packing Company				137,854		114,954
Northern Reefer						42,277
Grimes Packing Co.				55,240		

EXHIBIT # 17

NUMBER OF OPERATING UNITS AND COMPARATIVE PACK OF SHORE AND FLOATING CANNERIES AND FREEZER SHIPS

YEARS	SHORE CANNERIES	FLOATING CANNERIES	FREEZERS
1949	4,332,716 (105)	59,155 (12)	14,262 (6)
1950	3,122,251 (98)	185,466 (10)	17,415 (4)
1951	3,297,724 (112)	186,744 (11)	56,913 (12)
1952	3,419,539 (101)	154,589 (9)	114,372 (14)
1953	2,797,795 (92)	64,472 (8)	72,355 (9)
1954	3,043,348 (83)	51,405 (6)	105,806 (13)

[Title of District Court and Cause No. 7143-A.]

DEFENDANTS' STIPULATION No. 2

It is stipulated by the undersigned as follows:

1. The vessel Reefer II was used during the tax year 1952 by the Grimes Packing Company, or with its permission, in a business in connection with Alaska's commercial fisheries, consisting of obtaining salmon caught in Alaska waters and processing such salmon through freezing on board such vessel.

2. During the tax year 1952 such vessel was owned by the Grimes Packing Company, which Company consisted of an individual, O. L. Grimes, doing business under the name "Grimes Packing Company."

3. By reason of the prosecution and conduct of the business referred to in Paragraph 1 of this stipulation, the Grimes Packing Company, or O. L. Grimes, incurred a tax liability to the Territory of Alaska by virtue of the provisions of Chapter 97 SLA 1949, as amended, which tax liability is shown by the stipulation of facts and other evidence introduced at the trial of the consolidated actions of Territory of Alaska vs. Arctic Maid, et al, Civil Actions Nos. 7093-A et al, which tax liability has not been paid.

4. No tax returns with respect to such tax liability were made to the Territory of Alaska by O. L. Grimes.

5. O. L. Grimes died in December, 1952, and the

Territory of Alaska has never filed a claim for such tax liability against the Estate of O. L. Grimes.

6. Subsequent to the death of O. L. Grimes the defendant, Northern Reefer Company, acquired the vessel Reefer II by reason of a sale by and transfer from the Estate of O. L. Grimes.

7. The Territory of Alaska had no actual notice of the death of O. L. Grimes, of the probate of his estate, or of such transfer of the vessel Reefer II.

Dated: November 8, 1955.

/s/ JOHN H. DIMOND
Attorney for defendant, Northern Reefer Company.

/s/ EDWARD A. MERDES
Assistant Attorney General of Alaska. Attorney for plaintiff.

[Endorsed]: Filed Nov. 8, 1955.

[Title of District Court and Causes Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7142-A, 7143-A, 7129-A.]

OPINION

Filed March 17th, 1956

J. Gerald Williams, Attorney General, and Edward A. Merdes, Assistant Attorney General, for plaintiff. Evans, McLaren, Lane, Powell & Beeks, Seattle, Washington, and John H. Dimond, Juneau, Alaska, for defendants.

Hodge, District Judge.

Plaintiff in seven consolidated actions seeks to recover of the defendants occupational license taxes totaling, with penalty and accrued interest, $116,730.21, imposed by the Territory for the years 1951 to 1954 incl. under the provisions of Chap. 97, SLA 1949, as amended by Chap. 116, SLA 1951.

The pertinent parts of the statute involved read as follows:

"Sec. 1. Businesses in Alaska Fisheries Requiring Licenses: Amounts Thereof. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing * * *

(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing * * *"

Defendants deny liability for the tax, setting up six defenses, in substance as follows:

(1) A general denial of liability, under which issue defendants raise a question of statutory construction, denying that the fish which they buy or otherwise obtain are bought or obtained "for processing through freezing," but that they are obtained "for the purpose of preserving the fish for later processing through canning."

(2) That the fish taken by them are so taken partly in and partly outside of the three-mile limit and frozen aboard the vessel to preserve them for transportation to the State of Washington for canning, and that therefore their activities are beyond the taxing jurisdiction of the Territory, as in violation of Secs. 3 & 9 of the Organic Act (48 U.S.C.A., Secs. 24 & 77) and the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(3) That the provisions of Chap. 97 abridge, impair, and deny to the defendants the right to take or preserve fish in the waters of the Territory, in violation of the White Act (48 U.S.C.A. 222) as amended, and Sec. 3 of the Organic Act.

(4) The tax imposed is invalid and unconstitutional in that it imposes an undue burden on interstate commerce, and discriminates against and is an attempted regulation of interstate commerce, in violation of Article I, Sec. 8 of the Constitution.

(5) The tax unreasonably and arbitrarily discriminates against freezer ships and floating cold storages in favor of shore based cold storages, which

classification and discrimination is without reasonable justification, in violation of the equal protection, due process, and privileges and immunities clauses of the Fifth Amendment, the privileges and immunities clause of Article IV, Sec. 2, of the Constitution of the United States, and of Sec. 9 of the Organic Act.

(6) The tax imposed is arbitrary, oppressive, and confiscatory, and constitutes an attempted taking of defendants' valuable property and denial of their right to fish and preserve fish, in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution.

The following facts are undisputed: Defendants are the owners and operators of certain "freezer ships," converted and equipped with refrigeration facilities for the freezing of fish in the Territorial waters of Alaska, which are frozen by the "brine method," dumped into refrigerated holds, and taken to Puget Sound, Washington, where they are canned prior to resale. The freezer ships themselves do not engage in any fishing, but the fish loaded aboard the vessels are obtained either by purchase from individual fishermen or by the operation of "catcher boats" owned and operated by the defendants, or under contractual arrangement between the defendants and the owners of such boats. Fishing is done by means of gill nets in the Bristol Bay area and seines in other areas. Vessels anchor seaward of the three-mile zone while operating in the Bristol Bay area during such season, but while operating in the Kodiak Island and Southeastern Alaska

areas they anchor at points closer to the shore than three miles, usually in bays or inlets. The fishing boats operate between the ships and the shore, in all cases inside of the three-mile zone. Taxes have been paid by the defendants under the Act for the period from 1951 to 1954 incl. amounting to $8,929.99, but taxes accrued amounting to $93,583.75, exclusive of penalty and interest, have not been paid; and it is conceded that such taxes are due and owing to the Territory if valid.

The defenses interposed will be considered in the order named.

1. The contention that the fish are not obtained for "processing through freezing" as defined by the Act cannot be sustained within any reasonable statutory interpretation. The word "process" or "processing" in the sense used in this statute is defined by Webster's New International Dictionary as "a method of operation or treatment," and "denotes a progressive action or series of acts or steps, especially in the regular course of performing, producing or making something:" It "applies especially to measures or transactions, as a chemical process." It cannot be denied that freezing is "processing" as thus commonly understood.

2. The tax is levied upon the occupation of freezer ships and floating cold storages, but is based upon the value of the raw fish "bought or otherwise obtained for processing through freezing," and not upon the operation of freezing, as contended by defendants. Hence the prosecution of the line of business of the defendants taxed is not the freezing,

the major portion of which is done outside the three-mile limit, but the taking of the fish, all of which is done within the Territorial limits. The rule of Cunard Steamship Co. vs. Mellon, 262 U.S. 100, limiting the jurisdiction of the Territory over Territorial waters within the three-mile zone, does not apply in this case. Martinsen vs. Mullaney, 85 F. Supp. 76, pp. 78, 79.

3. It is well settled that the imposition by the Legislature of the Territory of license taxes relating to the commercial fisheries of Alaska to provide revenue as authorized by the Organic Act does not in any way alter, amend, modify, or repeal the existing fish laws of the United States applicable to Alaska; and hence such are not violative of the White Act or the Organic Act of Alaska. Pacific American Fisheries vs. Territory of Alaska, 2 F. 2d 9, affirmed 269 U. S. 269; Alaska Fish Salting etc. Co. vs. Smith, 255 U. S. 44; Haavik vs. Alaska Packers Ass'n., 263 U. S. 510; Alaska Pacific Fisheries vs. Territory, 236 F. 52.

The case of Freeman vs. Smith (CCA 9), 44 F. 2d 703, wherein it is held that a license tax of $250.00 on non-resident and $1.00 on resident fishermen violates the White Act as impairing equal rights of residents and non-residents to fish in Territorial waters, is distinguished from the case at bar as no distinction is made in Chap. 97 between residents and non-residents. In P. E. Harris & Co. vs. Mullaney, 87 F. Supp. 248, a statute imposing a tax on salmon traps in effect 3,000 times greater than the tax on seines was held "so excessive as to in-

fringe upon the right to fish on the basis of equality guaranteed by the White Act," and in reality an attempt to accomplish by such legislation the abolishment of fish traps, which was a right reserved to Congress, as "a legislative body may not, under the guise of exerting the power to tax, accomplish a forbidden end." Such attempted regulation does not appear to be the purpose of this Act.

In Anderson vs. Smith, 71 F. 2d 493, wherein a license fee of $25.00 from non-residents and $1.00 from residents was held not violative of such Act, the Circuit Court of Appeals for this Circuit has this to say upon the question:

"The question involved here, then, is not the power of the Legislature to discriminate between residents and non-residents, but the question is whether or not the license fee imposed by the Territorial Legislature is an unreasonable interference with a right granted by Congress, and, therefore, impliedly prohibited by Congress." * * * "We cannot say that the license fee imposed by Territorial Legislature in 1933 and now under attack is so unreasonable as to conflict with the act of Congress granting the right to fish (48 USCA 222)."

This is the exact situation here. The question of the reasonableness of the license tax is hereinafter discussed.

4. It is equally well settled that a license tax of the nature prescribed by Chap. 97 is not a burden upon or attempted regulation of interstate commerce, because the taxable event—the taking of fish—occurs before the fish have entered the flow

of commerce. Most decisive on this point are the decisions of the Supreme Court in the cases of Toomer vs. Witsell, 334 U. S. 385, and Oliver Iron Mining Co. vs. Lord, 262 U.S. 172. In the Toomer vs. Witsell case a statute imposing a tax of one-eighth cent per pound on green shrimp taken within the three-mile belt of the coast of South Carolina was held not to violate the commerce clause. The opinion states:

"Nor does the statute violate the commerce clause. It does not discriminate against interstate commerce in shrimp, and the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce."

Defendants rely upon another feature of this decision in which the court holds that a section of the statute which requires that owners of shrimp boats fishing in the maritime belt of South Carolina dock at a South Carolina port and unload, pack and stamp their catch before "shipping or transporting to another state" burdens interstate commerce in violation of the commerce clause; but this decision is wholly distinguishable from the license Act in question. In the Oliver Iron Mining Co. case it is held that an occupation tax on mining ore is not violative of the commerce clause where the ore does not enter interstate commerce until after the mining is done; and hence no discrimination against interstate commerce is involved even though the tax may indirectly affect such commerce. Defendants contend that these decisions do not apply because the "taxable event" is not the taking of the

fish but the freezing of the fish. With this I cannot agree, for although it is conceded that the license is upon the "line of business" of freezer ships and floating cold storages, as noted above it is the taking of fish which is the taxable event.

Defendants also rely upon the case of Anderson vs. Mullaney, 191 F. 2d 123, affirmed 342 U. S. 415, in which the Ninth Circuit Court of Appeals held invalid under the commerce clause an Alaska statute imposing a license fee of $50.00 upon non-resident and $5.00 upon resident fishermen, reversing this court (Folta J., 91 F. Supp. 907). But in this case the grounds of the decision were that the legislation imposed discriminatory taxes which operated to affect adversely the movement of interstate commerce by imposing unreasonable restrictions on the movement of fishermen from the states, which the Court described as a "great inter-state movement," beginning with the start of the fishermen north and terminating with the delivery of the finished product to the states; and that therefore the doctrine of Toomer vs. Witsell did not apply. This decision is not applicable here, as again there is no discrimination in the Act between residents and non-residents; and the Act cannot be said to impose such unreasonable restrictions on the movement of the freezer ships, even though all of the defendants' vessels are registered in and proceed from the states to the fishing grounds.

Defendants also rely upon the case of Foster-Fountain Packing Co. vs. Haydel, 278 U. S. 1, also involving the "Louisiana Shrimp Act," in which it

is held that prohibiting the export from the state of shrimp with heads and hulls removed was violative of the commerce clause as withholding raw shrimp from shipment out of the state. This was not a revenue or tax measure and is clearly distinguishable. In the same manner Hood & Sons vs. Du Mond, 336 U. S. 525, relates to the direct curtailment of interstate commerce by regulation.

I am unable to find that Chap. 97 imposes any burden on interstate commerce, or any "artificial rigidity on the salmon industry," by requiring the catching of salmon in the Territory and imposing restrictions on the shipment of fish out of the Territory prior to canning, as contended by defendants.

5. We come now to what this Court regards as the fundamental issue in this case, and that is the validity of the legislative classification in imposing a tax of 1% on the value of fish taken on the line of business of shore based cold storages, while imposing a 4% tax on the line of business of freezer ships and other floating cold storages. The principle involved was correctly stated in the opinion of this Court (Folta J.) in the case of Martinsen vs. Mullaney, supra (p. 79) as follows:

"Although the equal protection clause does not prohibit the classification of persons for taxation, such classification must not be unreasonable or arbitrary and, moreover, must be based on differences having a fair and substantial relation to the object of the legislation (which in this case is purely to raise revenue) so that all persons similarly circumstanced shall be treated alike."

Rapid Transit Corp. vs. New York, 303 U.S. 573, p. 584; Oliver Iron Mining Co. vs. Lord, supra; Carmichael vs. Southern Coal Co., 301 U. S. 495; State Board of Tax Commissioners vs. Jackson, 283 U.S. 527.

Differences in tax burdens not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the Constitutional prohibitions; and such statutes must be sustained if founded upon "substantial differences" between the occupations classified; or, the fact of discrimination in favor of a certain class does not make it arbitrary if the discrimination is founded on a reasonable distinction. Lawrence vs. State Tax Commission, 286 U.S. 276; State Board vs. Jackson, supra. In fact a very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subject to special forms of taxation as through a license tax; and if the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law. State Board vs. Jackson, supra, p. 537; Madden vs. Kentucky, 309 U.S. 83; Metropolitan Casualty Insurance Co. vs. Brownell, 294 U.S. 580. The burden of proof is on the party asserting the invalidity of such tax. Mullaney vs. Anderson, 342 U.S. 415.

In the following decisions statutes relating to the commercial fisheries of Alaska have been held valid as not contravening the Constitutional prohibitions

of the equal protection or privileges and immunities clauses of the Constitution: Alaska Fish Salting etc. Co. vs. Smith, supra (upholding license tax on manufacturers of fish oil and fertilizers from herring, although imposing higher taxes than those imposed on manufacturers of fish oil or fertilizer from other fish or offal of salmon); Pacific American Fisheries vs. Territory of Alaska, supra (holding license tax on salmon canneries graduated upward according to number of cases valid as "not so unreasonable or discriminatory" as to render it void, though admittedly discriminating between large and small canneries); Alaska Pacific Fisheries vs. Territory of Alaska, supra (holding occupational license tax on fish traps valid where the basis of classification of businesses is "reasonable and not merely arbitrary"); Haavik vs. Alaska Packers, supra (upholding annual license tax of $50.00 on non-resident fishermen as not contravening the privileges and immunities clause). See also Peringer vs. Territory of Alaska, 218 F. 2d 490 (upholding the Territorial income tax where there is an "obvious distinction between classes"); and Yerian vs. Territory of Hawaii, 130 F. 2d 786 (holding discrimination in classification between civilian employees and personnel of Armed Forces under a welfare act was not so arbitrary or unreasonable as to violate the Constitution).

Defendants rely upon the decisions of Mullaney vs. Anderson, Toomer vs. Witsell, and Martinsen vs. Mullaney, supra. In the Anderson case the Supreme Court affirmed a decision of the Ninth Cir-

cuit Court making an unwarranted distinction between resident and non-resident fishermen as also violative of the privileges and immunities clause. In the same manner the Supreme Court in the Toomer vs. Witsell case held another statute of South Carolina requiring residents to pay a license fee of $25.00 for shrimp boats and $2,500.00 for non-residents violative of the privileges and immunities clause. Martinsen vs. Mullaney likewise held invalid a discrimination between resident and non-resident fishermen as violative of the equal protection clause. None of these decisions are persuasive in this case. In fact the Court found in the Martinsen case that the stipulation on which the case was submitted "contains no facts tending to justify the discrimination * * * on any ground."

Tested by these principles it is necessary to examine the evidence to determine what, if any, reasonable distinctions exist as a matter of fact to justify the differential between the two classes. Defendants contend that there is none and that the two operations are identical, except that the freezer ships freeze their fish by the "brine method" and the land based cold storages by the "sharp freeze method" with the same result (testimony of Homer Kyros). If this were the only difference such would manifestly not justify the tax classification. However, other more important distinctions are pointed out by plaintiff, of which the following are particularly worthy of note:

(1) One class is a land based operation and the other is a transient operation continually on the

move (deposition of Thomas Parke). This situation has been recognized as an "evident difference in the mode of doing business." Singer Sewing Machine vs. Brickell, 233 U.S. 304.

(2) One class consists of local businessmen who pay local and Territorial taxes and who supply employment in the community, while the other class pays no such taxes and contributes little, if anything, to the development of the community and the Territory (deposition of Thomas Parke). It has been held that the encouragement of local enterprise or the taxation of one class of business leaving another untaxed to promote public interest may be considered a proper subject of classification even though favoring local residents. Haavik vs. Alaska Packers Association, supra; Carmichael vs. Southern Coal Co., supra. With regard to the payment of taxes, the land based cold storages pay, in addition to the 1% tax, employment security taxes, school tax and income tax to the Territory; and where situate within an incorporated city pay property taxes to such municipality (deposition of Wallace George). This item appears of particular importance in relation to the object and purpose of the Act, that is revenue.

It is argued by defendants that in any event this would not justify a difference of four times the tax on land based cold storages, as it was shown that on the basis of 1,000 fish the canneries would pay double the amount of the 4% tax under Chap. 97 (deposition of Thomas Parke; plaintiff's answer to interrogatory No. 10). It may be that this factor

alone would not justify the differential established; but certainly it may be taken into consideration along with other factors as considered herein.

(3) Neither class is in any way in competition with the other, and each has a different objective, for the freezer ships and the floating cold storages freeze fish for later canning only, while most of the fish taken by the land based cold storages are frozen for the fresh fish market; in fact the freezer ships take seine caught salmon while the land based cold storages for the most part take the more valuable and higher priced troll caught king and cohoe salmon (testimony of Jack C. Pinkerton; depositions of Wallace George and Thomas Parke). This is indeed a basic difference in operation, which the Legislature without doubt had in mind, and which alone may justify the discretion of the Legislature in making such classification.

(4) The cost of administering the tax laws and collecting taxes against freezer ships and floating cold storages is appreciably higher than the cost of administration and collection against land based operators (deposition of Thomas Parke; exhibits 12 & 13). This item may also be taken into consideration as a basis for classification, as long as there is a reasonable relationship between the higher tax and higher cost to the Territory. Toomer vs. Witsell, supra; Madden vs. Kentucky, supra; Mullaney vs. Anderson, supra; Fernandes vs. Wiener, 326 U.S. 340, p. 360. Defendants contend that such fact was not within the knowledge of the Legislature at the time of increasing the tax from 1% to 4% in 1951;

and it is true that consideration of enforcement costs should be based on known facts existing at the time "within the knowledge and experience of the legislature". Metropolitan Casualty Insurance Co. vs. Brownell, supra. The evidence did not indicate any substantial difference in the ratio of administrative costs prior to 1951 (exhibits 12, 13), but as argued by plaintiff the Legislature may well have anticipated such increased costs, especially on raising the rate of tax.

(5) The reezer ships do not pay their fair burden of conservation costs of the Alaska Department of Fisheries, involving considerable appropriations of the Legislature (exhibit no. 15). It is likewise held that the Legislature may impose a differential for any conservation expenditures from taxes which only residents pay. Toomer vs. Witsell, supra; Carmichael vs. Southern Coal Co., supra; Madden vs. Kentucky, supra.

Other differences are pointed out by plaintiff but such do not appear to be of sufficient importance to be reviewed here.

Defendants also complain that salmon canneries, both shore based and floating, are taxed at 1% of the value of fish frozen and not later canned (Sec. 1 (a) 1, Chap. 82 SLA 1949), and are not taxed at all with respect to the preservation through freezing of fish later canned; also that vessels engaged in the transportation of fish preserved through icing, as halibut boats, are not taxed during the years involved in this action. However, the evidence disclosed that the amount of fish taken by land

based cold storages which are not frozen for the market but frozen for later delivery to canneries is very small; and that this seldom occurs, and only when the run on canneries is so heavy that they cannot immediately take care of the fish delivered to them (deposition of Wallace George). Moreover, such canneries are subject to a 6% tax on the value of all raw fish purchased or otherwise obtained for canning. Chap. 82 SLA 1949 as amended by Chap. 113, SLA 1951. I do not find that this discrimination is sufficient to justify the invalidity of the tax.

Defendants further contend that the decisions upholding the classifications above referred to relate to the police power of the state which is prohibited in this instance as the Territory may not regulate the fisheries, but I do not find this contention to be sustained; nor does it come within the rule of Atlantic and Pacific Co. vs. Grosjean, 301 U.S. 412. See especially where this subject is mentioned, State Board vs. Jackson, supra, and Pacific American Fisheries vs. Territory of Alaska, supra.

In view of the distinctions above pointed out I cannot hold the classification made by the statute to be arbitrary and unreasonable, but find that there do exist substantial differences between these two businesses which constitute a sufficient basis for the classification made.

6th Defense. Finally, defendants complain that the imposition of the tax is so arbitrary and oppressive as to be confiscatory, denying their right to preserve fish in violation of the due process clause. There was no sufficient showing to justify any such

finding. Alaska Fish Salting etc. Co. vs. Smith, supra; Haavik vs. Alaska Packers Ass'n., supra.

By reason of the above, I cannot hold the statute repugnant to any of the clauses of the Constitution upon which defendants rely.

Counter Claim

In view of the above decisions a counter claim of four of the defendants for taxes allegedly paid under protest or threat of seizure of vessels need not be considered; except suffice it to say that there was no evidence of any such payment under protest or threatened seizure (deposition of Thomas Parke).

Lien

A separate issue has been raised in the Northern Reefer Co. and Grimes Packing Co. case as to a lien claimed on the vessel "Reefer II" under Sec. 4 (h), Chap. 82, SLA 1949, as a result of unpaid tax liability incurred by the prior owners of the vessel while employed in Alaskan waters. During the tax year 1952 this vessel was owned by O. L. Grimes, dba Grimes Packing Co., and was admittedly used for the purpose covered by the Act during such season, by reason of which the Grimes Packing Co. or O. L. Grimes incurred a tax liability under the Act amounting to $3,925.73, which is unpaid. In December, 1952, O. L. Grimes died. Some time after February 1, 1953, the vessel was transferred by administrator's sale from the estate of O. L. Grimes to the Northern Reefer Co., a purchaser for value in good faith and without notice of any liens. The Territory had no actual notice of the death of

Grimes, the probate of his estate or the transfer of the vessel, until after the commencement of this action.

The lien provision of the statute is as follows:

"(h) Liens. All taxes levied or provided or accruing under the provisions of this Act, and the penalties and interest thereon, are hereby declared to be a lien prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the business * * *"

This statute relates to the license tax imposed on salmon canneries. Sec. 4 of Chap. 97, SLA 1949 further provides as follows:

"The liability to file returns and pay interest and deficiency assessments, and the subjection of property to liens shall be the same as prescribed in the license tax law for salmon canneries."

It will be observed that the return by the taxpayer and payment of the tax was due January 15, 1953, or prior to the conveyance of the vessel, at which time the lien if valid had accrued.

It is understood that the validity of such tax lien was sustained by Judge Folta in the case of Territory of Alaska vs. American Can Co., civil No. 6866-A, upon denying a motion of the defendant to dismiss, but no opinion or memorandum of such decision was filed. It appears generally that

such lien provision is a lawful means of insuring collection of taxes by a defaulting taxpayer from the property used in the prosecution of the line of business; and that although ordinarily there is no liability incurred by the purchaser of personal property to pay a tax assessed against a former owner if no lien for the tax exists against the property purchased at the time of sale, if such tax has become a lien on the personal property of the tax debtor one who purchases the property after the lien attaches takes subject to it, whether he knows of it or not. 61 C.J., Taxation, Sec. 1355, p. 1042; Anno. 41 A.L.R. 188, 189.

It is not necessary that notice of lien be recorded, docketed or filed in the absence of statute requiring such. 53 C.J.S., Liens, Sec. 6, p. 850; U. S. vs. Curry, 201 F. 371. In this respect the lien is no different than the maritime lien for necessaries furnished vessels under the Ship Mortgage Act of the United States (Title 46, Sec. 971, U.S.C.A.).

This right of lien upon floating equipment such as is involved under the Act in question is in fact of vital importance to the Territory in the matter of enforcement of tax liability, for otherwise operators of vessels liable for the tax may readily escape payment by wholesale leasing arrangements; and must be sustained in the public interest.

Defendants contend that the lien is unenforceable in this instance for the reason that no claim was presented against the administrator of the estate. Although there is some conflict of authority

upon this point, the greater number of decisions hold that in the absence of statute requiring presentation of the claim against the estate as a prerequisite to enforcing the lien against specific property, a creditor may rely upon such specific lien although no claim was presented, but in such case has no claim against the general assets of the estate in the hands of the administrator. Anno. 34 A.L.R. 377, 379; Little vs. Keaton, 38 F. 2d 457; in re Baker's Estate, 187 Pac. 870. In any event, although there is also some authority to the contrary, it is generally held that a claim for taxes is not even within the contemplation of statutes requiring presentation of claims against decedents' estates. 21 Am. Jur., Executors and Administrators, Sec. 351, p. 580; Anno 34 A.L.R. 387; 109 A.L.R. 1370.

Defendants also claim laches in failure of the Territory to promptly enforce its lien, under the rule of The Salvator, 35 F. Supp. 558; but there was no sufficient showing of want of diligence on the part of the Territory to enforce such lien right; and it is very much to be doubted whether any such defense is available to enforce the rights of the Territorial Government to collect taxes due. 30 C.J.S., Equity, Sec. 114, p. 526.

Judgment may be entered for the amount of the tax shown by stipulation to be due as to each of the defendants, with penalty and interest, together with plaintiff's costs and an attorney's fee on the aggregate amount recovered in accordance with Rule 45, District Court Rules; and holding the lien

against the vessel "Reefer II" to be valid and enforceable.

Nome, Alaska, this 14th day of March, 1956.

/s/ WALTER H. HODGE
District Judge.

[Endorsed]: Filed March 17, 1956.

[Title of District Court and Causes Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7129-A.]

MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR A NEW TRIAL

Come Now defendants in each of the above entitled consolidated actions and respectfully move this Court to reconsider its Memorandum Opinion, heretofore announced, and enter judgment for defendants or in the alternative to grant a new trial.

Without waiving any defense heretofore asserted in these actions, defendants assign the following grounds in support of this Motion:

(1) The decision is based upon manifest misapprehensions of law and fact.

(2) That substantial justice has not been done.

EVANS, McLAREN, LANE,
POWELL & BEEKS
/s/ JOHN H. DIMOND
Attorneys for Defendants

[Endorsed]: Filed May 14, 1956.

[Title of District Court and Causes Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7142-A, 7143-A, 7129-A.]

SUPPLEMENTAL OPINION

Defendants have submitted herein a motion for reconsideration of the memorandum opinion of the Court filed herein on March 17, 1956, or in the alternative to grant a new trial, upon the grounds that the decision is based upon manifest misapprehensions of law and fact and that substantial justice has not been done. The principal contention of the defendants, by memorandum filed in support of such motion, is that the Court erred in holding that the prosecution of the line of business of the defendants taxed is not the freezing of fish, but the taking of the fish, which is done within the Territorial limits, and which is the "taxable event" considered in connection with the second and fourth affirmative defenses. It is contended that both parties had agreed that "the business of the defendants claimed to bring them within the operation of the tax is the operation of a freezer ship"; and that the construction placed by the Court is contrary to the position taken by both the Territory and the defendants.

It was the view of the Court in rendering such opinion that the words "the taking of fish" were equivalent to the language of the statute in question fixing the tax upon the value of the fish "bought or otherwise obtained for processing through freez-

ing." Upon careful reconsideration of this question I must adhere to the former opinion. The words objected to were taken from the language of the Supreme Court in the case of Toomer vs. Witsell, 334 U. S. 385, at page 394. The language of the Louisiana statute therein considered is found in footnote 10 of such opinion on page 389, as follows:

"The following fisheries' tax is hereby imposed upon all fish or fisheries products taken or canned, shucked or shipped for market, to wit * * * on each pound of green shrimp, one-eighth of one cent * * *"

I can see no real distinction between the words fish or fisheries products "taken" and fish or fisheries products "obtained" by fishing.

In the same manner the Minnesota statute considered by the Supreme Court in the case of Oliver Iron Mining Co. vs. Lord, 262 U.S. 172, cited by the court, is found in a footnote at page 174 of the opinion as follows:

"Every person engaged in the business of mining or producing iron ore or other ores in this state shall pay to the State of Minnesota an occupation tax equal to 6% of the valuation of all ores mined or produced."

The court holds that such tax is imposed "only in respect of the mining" and hence no discrimination against interstate commerce is involved. Similarly the tax here in question is imposed only in respect to the fish taken, bought or otherwise obtained for processing through freezing.

It may be that plaintiff conceded in its final brief

that it is the business of the operation of freezer ships which is taxed. But what operation? There is no tax based upon the amount of fish frozen but only on the amount of fish so bought or obtained for such purpose, which surely is an essential part of the operation of the freezer ship. I do not believe that it was the intention of the plaintiff to concede that it is the operation of freezing which is taxed, or which is the "taxable event." It is also true that the "subject" is the freezer ship or other floating cold storage, but the act taxed is the obtaining of the fish. That this was the obvious intention of the Legislature is also clearly indicated by the language of the tax imposed on salmon canneries, both shore based and floating, except that in such case the tax is based on the value of the raw fish obtained for "canning" instead of "for processing through freezing," departing entirely from the principle of the previous salmon cannery "case tax," on the operation of canning, repealed by such Act, provided by Sec. 35-1-11, Subsection 7, A.C.L.A. 1949. See Chap. 82, SLA 1949, as amended by Chap. 113, SLA 1955.

If it were otherwise both floating cold storages and floating canneries could exploit the highly important fisheries resources of Alaska and escape all tax liability by the simple expedient of anchoring their floating equipment outside of the three-mile limit, which is neither just nor consistent with the taxing authority of the Legislature.

Neither is the contention of the defendants borne out by the definition of the term "fisherman" as one

who "takes or attempts to take salmon" as defined by Chap. 66, SLA 1949, imposing a license tax on fishermen. For here the words "otherwise obtained" clearly include such taking of fish by fishermen.

It is also contended by defendants that under the court's interpretation, the freezer ships would pay no tax if they purchased all their fish from independent fishermen. This could hardly be true as the language of the statute includes fish both "bought" from independent fishermen and "otherwise obtained" by their own fishermen.

If the evidence shows that some fish were taken outside the three-mile limit as contended by defendants, I do not recall it; but if so, such amount must be manifestly small, and not the principal operation of defendants, for the evidence showed that the fish taken were mostly salmon, which are not taken at sea, but close to shore as the salmon approach the spawning grounds.

Finally, defendants argue with respect to their fifth defense that if the tax be on the taking of the fish, differences not related to such taking are irrelevant and cannot serve to support the tax differential found by the Court. This cannot be true, for the tax based on land based cold storages in comparison with which the tax was claimed discriminatory is fixed upon exactly the same basis, that is fish "bought or otherwise obtained for processing through freezing" (Sec. 1, Chap. 97, SLA 1949, as amended by Chap. 116, SLA 1951).

Exceptions to Findings of Fact and Conclusions of Law

Defendants have also filed numerous exceptions to findings of fact and conclusions of law presented by counsel for plaintiff, principally raising the same questions as upon their motion. Some of the findings proposed appear to contain recitations of specific facts not included in the opinion, which may be objectionable. However, under the provisions of Rule 52 (a) F.R.C.P., findings of fact and conclusions of law are not necessary where a written opinion or memorandum decision is filed, if findings of fact and conclusions of law appear therein. The opinion of the Court contains findings and conclusions covering all issues of law and fact raised in this controversy, sufficient in my opinion for review. Therefore no findings of fact and conclusions of law as presented will be entered and exceptions thereto need not be considered.

Finding no errors as contended by defendants, judgment presented by the plaintiff is entered this day.

Dated at Nome, Alaska, this 21st day of May, 1956.

/s/ WALTER H. HODGE
District Judge.

[Endorsed]: Filed May 25, 1956.

In the District Court for the District of Alaska
Division Number One At Juneau

Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7142-A, 7143-A, 7129-A

TERRITORY OF ALASKA, Plaintiff,

vs.

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., et al. Defendants.

JUDGMENT

This matter came before the Court for trial on November 8 and 9, 1955 at Ketchikan, Alaska, upon the Complaints of the Territory of Alaska, and the Answers of the above-named defendants, and plaintiff being represented by Edward A. Merdes and Henry J. Camarot, Assistant Attorneys General, and the defendants being represented by John H. Dimond of Juneau, Alaska and Byron Lane and Martin P. Detels, Jr., of Evans, McLaren, Lane, Powell and Beeks of Seattle, Washington, and evidence having been adduced in open Court by and on behalf of the parties hereto, and briefs having been filed on behalf of the plaintiff and defendants, and the Court having heard extensive argument by both parties and being fully informed and having rendered its written opinion dated and filed March 17, 1956, including its Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed:

(1) That Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951 is a valid and Constitutional statute and a proper exercise of the Legislature's taxing authority granted by Alaska's Organic Act.

(2) That the plaintiff recover from the following defendants, aggregate taxes, penalties and interest in the amount of $115,198.60 with interest on $90,717.17 at 6% per annum from May 1, 1956 until paid and attorney fees and costs as follows, to-wit:

	Amount of taxes, penalties and interest as of May 1, '56	Pro rata attorney fees and costs	Total to be collected
Arctic Maid	$18,351.83	$243.75	$18,595.58
Alaska Reefer	16,073.21	214.62	16,287.83
Pacific Reefer	18,400.39	245.28	18,645.67
Pacific Queen	13,429.89	179.30	13,609.19
North Star	31,617.94	420.04	32,037.98
American Packing Co.	10,423.84	137.97	10,561.81
Northern Reefer	2,892.69	38.32	2,931.01
Grimes Packing Co.	4,008.81	53.65	4,062.46

(3) That the defendants, Arctic Maid, Pacific Queen, Alaska Reefer and North Star are not entitled to any relief or recovery whatever on their counterclaims.

(4) That Section 4 (h) of Chapter 82, SLA 1949, as incorporated into Chapter 97, SLA 1949, as amended, is a constitutional statute and the lien created thereby is valid and enforceable against the Vessel "Reefer II".

(5) Execution may issue in accordance with law for the enforcement of this Judgment.

Dated and signed at Nome, Alaska, this 21st day of May, 1956.

/s/ WALTER H. HODGE
United States District Judge.

I acknowledge receipt of three (3) copies of this Judgment this 4th day of May, 1956.

/s/ JOHN H. DIMOND
Attorney for Defendants.

Received May 7, 1956. Hold until May 20.

/s/ WALTER H. HODGE
District Judge.

Entered Court Journal at Juneau No. 22, pages 340-341.

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Causes Nos. 7093-A, 7129-A, 7130-A, 7131-A, 7132-A, 7143-A.]

NOTICE OF APPEAL

Notice is given that each of the above named defendants appeals to the United Court of Appeals for the Ninth Circuit from the final judgment in the above numbered consolidated actions, dated and signed on May 21, 1956, and entered on May 25, 1956.

Dated May 20, 1956.

/s/ JOHN H. DIMOND
Attorney for Defendants

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Cause No. 7093-A.]

SUPERSEDEAS AND COST BOND ON APPEAL

Know All Men By These Presents:

That We, Arctic Maid and Arctic Maid Fisheries, Inc., the Defendants above named, as Principal, and the General Casualty Company of America, Seattle, Washington, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the Territory of Alaska, as Surety, are held and firmly bound unto Territory of Alaska, the Plaintiff above named in the just and full sum of Twenty Thousand Four Hundred Thirty and 53/100ths Dollars ($20,430.53), for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of June, A.D., 1956.

The Condition of This Obligation Is Such, that,

Whereas, the above named Plaintiff on the 21st day of May, A.D., 1956, in the above entitled action and Court, recovered judgment against the Defendants above named for the sum of Eighteen Thousand Five Hundred Ninety-Five and 58/100 Dollars ($18,595.58) with interest from May 1, 1956.

And Whereas, The above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said United States District Court for the District of

Alaska to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals Arctic Maid and Arctic Maid Fisheries, Inc. shall pay to Territory of Alaska, the Plaintiff above named, all costs and damages that may be awarded against Arctic Maid and Arctic Maid Fisheries, Inc. on the appeal, or on the dismissal thereof, and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the said United States Court of Appeals for the Ninth Circuit may render or make, or order to be rendered or made by said United States District Court for the District of Alaska then this obligation to be void; otherwise to remain in full force and effect.

June 14, 1956.

[Seals] ARCTIC MAID and ARCTIC MAID FISHERIES, INC.

/s/ DON HANSEN
President

Attest: June 14, 1956.

/s/ J. G. BLASINGAME
Secretary

[Seal] GENERAL CASUALTY COMPANY OF AMERICA

/s/ By F. DEWEY BAKER
Attorney-in-Fact

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Causes Nos. 7093-A, 7129-A, 7130-A, 7131-A, 7132-A, 7143-A.]

ORDER EXTENDING TIME FOR DOCKETING RECORD ON APPEAL

Upon consideration of the motion of defendants in the above actions requesting an order for extension of time within which to file and docket the record on appeal, it is hereby Ordered:

That the time for filing the record on appeal and docketing the appeal in the above entitled actions in the United States Court of Appeals for the Ninth Circuit be and it hereby is extended to September 18, 1956.

Done in open court at Ketchikan, Alaska, this 14th day of July, 1956.

Entered Court Journal at Juneau, No. 22, page 355.

/s/ WALTER H. HODGE
District Judge.

Entry of the above order approved this 12th day of July, 1956.

J. GERALD WILLIAMS
Attorney General of Alaska

/s/ By HENRY J. CAMAROT
Assistant Attorney General
Attorney for Plaintiff

[Endorsed]: Filed July 14, 16, 1956.

[Title of District Court and Causes Nos. 7093-A, 7129-A, 7130-A, 7131-A, 7132-A, 7143-A.]

CLERK'S CERTIFICATE

United States of America,
Territory of Alaska,
First Division—ss.

I, J. W. Leivers, Clerk of the United States District Court for the District of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and orders of the court filed in the above-entitled causes and are the ones designated by the appellant hereto to constitute the record on appeal.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled Court to be affixed at Juneau, Alaska, this 12th day of September, 1956.

[Seal] J. W. LEIVERS
Clerk of District Court

/s/ By HELEN E. ROFF
Deputy

[Endorsed]: No. 15283. United States Court of Appeals for the Ninth Circuit. Arctic Maid and Arctic Maid Fisheries, Inc., Appellants, vs. Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed: September 13, 1956.

Docketed: September 19, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Nos. 15283-88

ARCTIC MAID and ARCTIC MAID FISHERIES, INC.; PACIFIC REEFER FISHERIES; PACIFIC QUEEN and PACIFIC QUEEN FISHERIES; ALASKA REEFER FISHERIES; NORTH STAR and NORTH STAR FISHERIES; and NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II (a vessel),

Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

CONCISE STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY

Come now appellants in the above entitled ap-

peals and, pursuant to Rule 17 (6) of the Rules of this Court, submit herewith a concise statement of the points upon which they rely.

I.

The Court erred in finding or concluding, on page 4 of its memorandum opinion, that the fish secured by appellants were "bought or otherwise obtained for processing through freezing" within the meaning of that term as used in Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951 (hereinafter referred to as the "Act").

This was error because it was shown by a preponderance of the evidence that defendants' fish were not obtained for processing through freezing but were obtained for canning and were frozen for the purpose of preserving them for such canning outside of the Territory of Alaska.

II.

The Court erred in finding or concluding, on page 5 of its memorandum opinion, that "the line of business of the defendants taxed is * * * the taking of the fish," within the meaning of the Act rather than the operation of a freezer ship.

This was error because the Act imposes a tax upon the line of business of operating a freezer ship.

III.

The Court erred in finding and concluding that appellants were taxable under the Act with respect to all fish purchased or otherwise obtained by them.

This was error because the evidence showed with-

out dispute the number of fish purchased or otherwise obtained while appellants' freezer ships were being operated in the Territorial waters of Alaska, and the number purchased or otherwise obtained while the said vessels were being operated outside the Territorial waters of Alaska, and the imposition of Territorial taxes upon the operation of a freezer ship outside the jurisdiction of Alaska violates Article 1, Section 8, the Fifth and Fourteenth Amendments of the Constitution, and Sections 3 and 9 of the Organic Act for Alaska, 48 USC, Sections 24, 77.

This was error for the additional reason that the evidence showed without dispute that not all fish purchased or otherwise obtained by appellants were taken by company boats operated by appellants, but that appellants also purchased fish from independent fishermen. If the Court's finding or conclusion that the line of business taxed by the Act was the taking of fish is correct, appellants are not taxable with respect to fish taken by independent fishermen.

IV.

The Court erred in finding, on page 4 of its memorandum opinion that "the fishing boats operate * * * in all cases inside of the three-mile zone.", and on page 5 that "the taking of the fish * * * is (all) done within the Territorial limits."

This was error because it was not supported by the evidence, but on the contrary it was shown by a preponderance of the evidence that the appellants' fishing boats operate both within and outside the

three-mile zone of Territorial waters, and that the fish purchased or otherwise obtained by the appellants were taken partly within and partly outside the Territorial limits of Alaska.

V.

The Court erred in stating, on page 4 of its memorandum opinion, that "it is conceded that (the amount of taxes claimed to be due by the Territory) are due and owing to the Territory if valid," and on page 15 that "the amount of the tax (was) shown by stipulation to be due."

This was error because it was stipulated and conceded that such amount was proper if the Act was valid and applicable to all fish purchased or otherwise obtained by the appellants, but appellants did not stipulate or concede that the tax was valid nor that it was applicable, if valid, to all fish purchased or otherwise obtained by the appellants, nor that such amount, or any amount, was due and owing by them to the Territory.

VI.

The Court erred—(a) in finding or concluding, on pages 10-12 of its memorandun opinion, that the Territorial legislature has not made an arbitrary and unreasonable classification between (A) the business of operating freezer ships and other floating cold storages, and (B) shore-based cold storages, other fish processors and shore-based and floating canneries; and that there exist substantial differences between those two classes of businesses which constitute a sufficient basis for the classifica-

tion made; and (b) in finding or concluding that such legislative discrimination against defendants was not in violation of any or all of the following:

(1) The White Act, 48 USCA, Section 222.

(2) Section 3 of the Alaska Organic Act, 48 USCA, Section 24.

(3) The equal protection clause of the Fourteenth Amendment to the Federal Constitution.

(4) The privileges and immunities clauses of the Fourteenth Amendment and of Article IV, Section 2 of the Federal Constitution and the prohibition against the granting of any special or exclusive privilege or immunity, forbidden by Section 9 of the Alaska Organic Act, 48 USCA, Section 77.

(5) The due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution.

This was error because, if the Court was correct in finding or concluding that the line of business taxed under the Act was the taking of fish, there are no differences in fact between the taking of fish when performed by or on behalf of operators of freezer ships, and the taking of fish when performed by or on behalf of shore-based cold storages, other fish processors and shore-based and floating canners, which constitute a sufficient basis for the classification made.

This was also error if, as appellants contend, the line of business taxed under the Act is the operation of a freezer ship, because there are no substantial differences in fact having a fair and substantial relation to the only permissible object of Territorial

fisheries legislation, which is to raise revenue, between the operation of a freezer ship and the operation of a shore-based cold storage plant, a shore-based or floating cannery or other fish processing plant.

VII.

In respect to the purported differences or distinctions between the two classes of business, i.e., (1) freezer ships and other floating cold storages, and (2) shore-based cold storages, other fish processors and shore-based and floating canneries, the Court erred as follows:

(a) In finding or concluding, on page 10 of its memorandum opinion, that class (2) is a "land-based operation", and that class (1) is a transient operation continually on the move, and in concluding that this difference justifies the tax discrimination against appellants.

This was error because floating canneries in class (2) are as much transient operations as those of appellants' freezer ships, and for the additional reason that such a difference would have no reasonable relation to any permissible objec of Territorial fisheries legislation.

(b) In finding or concluding, on page 10 of its memorandum opinion, that class (2) "consists of local businessmen who pay local and Territorial taxes and who supply employment in the community," and that those in class (1) pay "no such taxes and contribute little, if anything, to the development of the community and of the Territory;".

This was error because the Act does not purport

to distinguish between resident and non-resident operators of freezer ships, and a freezer ship operator who was a resident of Alaska would pay such local and Territorial taxes and supply employment in the Territory and in the community in which he lives, and for the additional reason that such a difference would have no reasonable relation to any permissible object of Territorial fisheries legislation.

(c) In finding or concluding, on page 11 of its memorandum opinion that the two classes are not in competition with each other and that each has a different objective.

This was error because there is insufficient evidence to support the finding of lack of competition, and for the additional reason that such a difference would have no reasonable relation to any permissible object of Territorial fisheries legislation.

(d) In finding or concluding, on page 11 of its memorandum opinion, that the cost of administering the tax laws and collecting taxes against class (1) is "appreciably higher" than the cost of administering and collecting taxes against class (2), and that such difference bears a reasonable relationship to the different tax treatment.

This was error for the reason that such a finding and the conclusion therefrom, is not supported by the evidence in this case, nor was such a difference a factor within the knowledge or experience of the Territorial legislature at the time it made the classification, and for the additional reason that such a difference would have no reasonable relation to any

permissible object of Territorial fisheries legislation.

(e) In finding or concluding, on page 12 of its memorandum opinion, that "freezer ships do not pay their fair burden of conservation costs of the Alaska Department of Fisheries and that the legislature was authorized to impose a differential in tax between the two classes.

This was error first, because the Act does not purport to distinguish between resident and non-resident operators of freezer ship owners and operators, secondly, because evidence as to conservation costs and expenditures should have not been considered—the Territory having no duty or authority to regulate, control or conserve the fisheries of the United States in the waters of Alaska, thirdly, because there was no evidence that the Alaska Department of Fisheries is supported by taxes which only residents pay, and, fourthly, the additional reason that such a difference would have no reasonable relation to any permissible object of Territorial fisheries legislation.

VIII.

The Court erred in finding or concluding, on pages 6 and 7 of its memorandum opinion that the fisheries taxing scheme of the Territory as sought to be applied to appellants does not constitute an undue burden upon or discrimination against or attempted regulation of interstate commerce.

This was error because in the operation of their freezer ships, consisting in the purchasing of or otherwise obtaining fish caught within or without

the Territory of Alaska, and the refrigeration and transportation of such fish to the State of Washington, appellants are engaged exclusively in interstate commerce.

This was error for the additional reason that it was shown by the undisputed evidence that the taxing scheme of the Territory unlawfully discriminates against interstate commerce by imposing a tax of 4% on the appellants who preserve fish by freezing them for processing by canning in the State of Washington, as compared with no tax on persons preserving fish by freezing for processing by canning in the Territory of Alaska, and a tax of 1% on persons preserving fish by freezing in Alaska where such fish are not later canned.

This was error for the further reason that the tax scheme is an attempted regulation of interstate commerce in that it provides for discriminatory tax treatment between freezership operators and other fish processors, the intent and operation of which is to promote local enterprise, employment and revenue by requiring the canning or processing of fish within the Territory of Alaska and discriminates against the movement of unprocessed or uncanned fish in interstate commerce.

IX.

The Court erred in finding and concluding, on pages 5-6 of its memorandum opinion, that the Territorial fisheries legislation does not abridge, impair or deny appellants' right to take or preserve fish on the basis of substantial equality, in violation of the

White Act, 48 USCA, Section 222, and Section 3 of the Organic Act, 48 USCA, Section 24.

This was error because the evidence showed that appellants were taxed with respect to the taking or freezing of fish at the rate of 4% of the value of the raw fish obtained by them, as compared with a tax of 1%, or no tax, upon other persons engaged in the taking or freezing of fish.

X.

The Court erred in admitting into evidence, over the objection of appellants, those portions of Exhibit No. 12 of appellee's Stipulation No. 1, and of appellee's Exhibit No. 1, which show, for the years 1951 through 1955, purported expenditures made by the Department of Taxation over and above routine office expenses in the administration and collection of taxes imposed by the Act.

This was error because the amendment to the Act in which freezer ships were singled out for discriminatory tax treatment was made in 1951 (Chapter 116, SLA 1951, Section 1(b)), and therefore facts as to costs of administration and enforcement of this tax, incurred after that date, that is, between 1951 and 1955, could not have been factors within the knowledge and experience of the legislators and upon which the Legislature could have relied in deciding to increase the tax on freezer ships 400%.

XI.

The Court erred in admitting into evidence, over the objections of appellants, Section (b) of Exhibit

No. 13 of appellee's Stipulation No. 1, Section (b) of appellee's Exhibit No. 2, and the testimony of Mr. Thomas Parke appearing at page 116, line 12, to page 117, line 11 of the transcript of testimony, which purport to show for the years 1951 through 1954, the general ratio between the administrative expenses of enforcement and collection of taxes imposed by the Act upon freezer ships and the taxes actually collected.

This was error for the reasons specified in Paragraph X, supra.

XII.

The Court erred in admitting into evidence, over the objections of defendants, Exhibit No. 14 of appellee's Stipulation No. 1, and appellee's Exhibit No. 3, the testimony of Mr. Thomas Parke appearing at page 121, lines 10-13, of the transcript of testimony, and the testimony of Mr. Wallis George, at page 162, line 19 to page 164, line 12 of the transcript of testimony, which purport to show the amount of money paid by land-based cold storages and other fish processors, except freezer ships, to the Territory and its municipalities in respect to taxes other than those imposed by the Act.

This was error because the Act on its face does not purport to distinguish between resident and non-resident freezer ship owners or operators, and such evidence was in no way relevant to the issues in this case.

XIII.

The Court erred in admitting into evidence, over the objection of appellants, Exhibit No. 15 attached

to appellee's Stipulation No. 1, relating to expenditures made by the Territorial legislature in respect to the fisheries of the United States in the waters of Alaska.

This was error for the reason that such evidence was not relevant to any issue in this case. The expenditures shown in the objectionable evidence were not shown to come from taxes which only residents paid, nor does the statute make any distinction between resident owners and non-resident owners. It was error for the additional reason that the Territory of Alaska has no duty or authority to regulate, control or conserve the fisheries of the United States in the waters of Alaska, or to appropriate public moneys to that end.

XIV.

The Court erred in finding or concluding, on page 13 of its memorandum opinion, that tax payments made by appellants Arctic Maid Fisheries, Pacific Queen Fisheries, Alaska Reefer Fisheries and North Star Fisheries, were not made under protest or through error.

This was error because the Act made the application for a license and the payment of taxes thereunder a condition precedent to the prosecution of the line of business of operating a freezer ship, and payment of the said taxes was made under the business compulsion provided by the Act.

XV.

With respect to Civil Action No. 7143-A, Terri-

tory vs. Northern Reefer Company, Grimes Packing Company and Reefer II (a vessel), the court in addition to the errors hereinabove asserted, further erred in holding that appellee had a valid and enforceable lien upon the vessel Reefer II for a purported unpaid tax liability incurred by the Grimes Packing Company, the prior owner of the vessel, while it was employed in Alaska waters.

This was error and the lien was unenforceable because (a) the lien is claimed by reason of purported tax liability of the Grimes Packing Company incurred in 1952, no notice of claim of lien was ever filed of record at any place, appellant Northern Reefer Company purchased the vessel from the Estate of O. L. Grimes, deceased, for value, in good faith, and without notice of any such claim of lien, and the claim of lien was not asserted until after such transfer; and (b) the Territory at no time presented any claim or demand on account of such taxes to the Estate of O. L. Grimes or to the Administrator thereof, either in the domiciliary estate of the decedent in the State of Washington, or in the ancillary estate of the decedent in Alaska, and both of said estates were closed and distribution of the assets thereof made prior to the assertion of this claim of lien; and (c) the Territory is guilty of laches in its failure to promptly enforce its purported claim of lien.

XVI.

The Court erred in entering its judgment of May

25, 1956, and in denying appellants' motion for reconsideration or in the alternative for a new trial.

EVANS, McLAREN, LANE,
POWELL & BEEKS

Attorneys for Appellants in Arctic Maid, Pacific Reefer, Pacific Queen, Alaska Reefer and North Star Appeals

BOGLE, BOGLE & GATES,

Attorneys for Appellants in Northern Reefer Appeal.

/s/ JOHN H. DIMOND
Attorney for All Appellants.

[Endorsed]: Filed Sept. 20, 1956. Paul P. O'Brien, Clerk.

In the District Court for the District of Alaska
Division Number Three, at Anchorage

No. A-10,029

TERRITORY OF ALASKA, Plaintiff,

vs.

PACIFIC REEFER FISHERIES,
Defendant.

COMPLAINT

Comes now, the Plaintiff, and for its cause of action against the Defendant alleges:

I.

That the Territory of Alaska is a sovereign incorporated Territory organized under the laws of the United States.

II.

That the said Defendant, during the years 1952 and 1953, failed to pay taxes due and owing Territory of Alaska.

III.

That by reason of the foregoing, Defendant owes Plaintiff the sum of $6,149.65, the same being taxes due the Plaintiff under the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951.

IV.

That Defendant, through wilful neglect, has failed to remit such tax when due, therefore there is now due and owing to Plaintiff, in addition to

the amount of such tax, the sum of $1,537.41, the same being a statutory penalty.

V.

That by reason of the fact that said tax was not paid when due, although demands have been made of the Defendant for the same, it is delinquent, and there is now due and owing to the Plaintiff, in addition to said tax and penalty:

(a) The sum of $348.89 representing interest on said tax at the rate of 6% per annum, accrued from the due date, January 15, 1953 to July 15, 1954, together with,

(b) interest on said taxes at the same rate from and after July 15, 1954, until paid.

VI.

That the total sum now due and owing Plaintiff from Defendant is $8,035.95, together with interest at 6% per annum on the sum of $6,149.65 from and after July 15, 1954, until paid.

VII.

That all conditions precedent necessary to the commencement of this action and to the fixing of Defendant's liability for such taxes, interest and penalties, have been performed by Plaintiff or have occurred.

Wherefore, Plaintiff prays that the court enter herein a decree as follows:

1. That Plaintiff have judgment against the Defendant for the total sum of $8,035.95 with interest

on $6,149.65 at 6% per annum from July 15, 1954, until paid.

2. For a reasonable attorney's fee and the costs of this action.

3. For such other and further relief as to the court may seem meet and just.

Dated at Juneau, Alaska, this 12th day of July, 1954.

J. GERALD WILLIAMS,
Attorney General
/s/ By EDWARD A. MERDES,
Assistant Attorney General

Duly Verified.

[Endorsed]: Filed July 14, 1954.

[Title of District Court and Cause No. 7129-A.]

DEFENDANT'S ANSWERS TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES

Now comes defendant by Robert Breskovich, managing partner, who, being first duly sworn, in response to the interrogatories served upon defendant in the above case makes the following answers:

No. 1:

Washington Business and Occupation Tax

Bi-monthly period	Calendar Year 1952	1953	1954	1955 to date
Jan.-Feb.	$	$130.03	$ 66.79	$ 60.85
Mar.-Apr.		61.49	276.72	94.56
May-June		46.25	11.03	5.44
July-Aug.		16.22	223.56	
Sept.-Oct.	92.42	101.13	923.61	
Nov.-Dec.	197.24	98.65	33.29	
	$289.66	$453.77	$1,535.00	$160.85

Nos. 2, 3:

Alaska Business License Tax, Chapter 97, SLA 1949, as amended, paid to Department of Taxation, Juneau

Tax year	Date of Payment	Amount
1952	April 10, 1952	25.00 Bristol Bay
1953	"	25.00 Bristol Bay
1954	October, 1954	25.00 Bristol Bay
	"	25.00 Southeastern
1955	May 23, 1955	25.00 Bristol Bay
	"	25.00 Southeastern

No. 4: Defendant has no records which would enable it to answer this question, but believes that salmon were caught both within and without a distance of three miles from mean low tide mark on the coastline of Alaska.

/s/ ROBERT BRESKOVICH,
Partner

Subscribed and sworn to before me this 9th day of September, 1955.

[Seal] /s/ ELEANOR M. BARROWS,
Notary Public in and for the State of Washington, residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 13, 1955.

[Title of District Court and Cause No. 7129-A.]

ANSWER AND COUNTER-CLAIM OF DEFENDANT PACIFIC REEFER FISHERIES

Defendant, Pacific Reefer Fisheries, answers Plaintiff's complaint, as follows:

First Defense

I.

Answering Paragraph I of the Complaint, defendant admits the same.

II.

Answering Paragraph II of the Complaint, defendant denies that during the years 1952 and 1953, or either of them, defendant failed to pay taxes to the Territory of Alaska.

III.

Answering Paragraph III of the Complaint, defendant denies that it owes the plaintiff the sum of $6,149.65, or any other amount whatever, for taxes dues for the tax years 1952 and 1953, or either of them, under the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951.

IV.

Answering Paragraph IV of the Complaint, defendant denies that it has through willful neglect failed to remit such tax and denies that there is due, as penalty or otherwise, the sum of $1,537.41, or any other amount whatever.

V.

Answering Paragraph V of the Complaint, defendant denies each and every allegation therein contained.

VI.

Answering Paragraph VI of the Complaint, defendant denies that there is now due and owing from it to plaintiff the sum of $8,035.95, or any other amount whatsoever.

VII.

Answering Paragraph VII of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

Second Defense

I.

Defendant alleges that it is a partnership composed of the following individuals, each of whom is a citizen of the United States: John Breskovich, Robert Breskovich, Helen Breskovich, Joseph S. Rosin, and that each of them is a resident of the State of Washington.

II.

Defendant alleges that it owns and operates the Diesel Electric Vessel Pacific Reefer, a vessel registered under the laws of the United States under No. 263890 at the Port of Tacoma, Washington; that it purchased the vessel in 1952; that it has a large investment in the same; that it expended further sums in converting the vessel for use as a

"freezer ship", primarily for employment in the freezing and transportation of salmon obtained on the high seas off the Coast of Alaska.

III.

Defendant alleges that during the period involved in this suit its operations have been confined to the Bristol Bay red salmon season, in which the salmon obtained by the D/V Pacific Reefer were caught by smaller gas-operated "catcher" boats having a maximum length of 32 feet and an approximate breadth of 10 feet; that the "catcher" boats which delivered salmon to the D/V Pacific Reefer were owned by and operated for the defendant; that the "catcher" boats employ the "gill-net" method of catching salmon; that the salmon caught by the said "catcher" boats have been taken within a line drawn parallel to and at a distance of three miles from the mean low tide mark on the coastline of Alaska, and partly outside that line; that all fish obtained by the D/V Pacific Reefer were obtained while the D/V Pacific Reefer was seaward of a line drawn parallel to and at a distance of three miles from the mean low tide mark on the coastline of Alaska; that in obtaining such fish the D/V Pacific Reefer was operating on the high seas and outside the territorial jurisdiction of Alaska.

IV.

Defendant further alleges that the salmon loaded aboard the D/V Pacific Reefer were frozen aboard the vessel to preserve them for transportation to

the State of Washington where during the tax years 1952 and 1953 they were to be and have been canned and sold for further resale in interstate commerce.

V.

Defendant further alleges that its operations for its fiscal year which included the 1952 tax year resulted in a net loss of $61,701.13; that its operations for the fiscal year including the 1953 tax year resulted in a net loss of $24,394.67.

VI.

Defendant alleges that the plaintiff is seeking to apply the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, to activities of the defendant which are beyond the taxing jurisdiction of the Territory of Alaska in violation of Sections 3 and 9 of the Organic Act, 48 U.S.C.A. Sections 24 and 77, 37 Stat. 512, 514, as amended, and the due process clause of the Fifth and Fourteenth Amendments to the Constitution.

Third Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the activities of the defendant, would abridge, impair and deny to

defendant the right to take or preserve fish in waters in which fishing is permitted by the Secretary of the Interior, in violation of Section 1 of the Act of June 6, 1924, 48 U.S.C.A. 222, 43 Stat. 464, as amended, and Section 3 of the Organic Act, 48 U.S.C.A. 24, 37 Stat. 512, as amended.

Fourth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the operation of the defendant's D/V Pacific Reefer is invalid and unconstitutional in that it imposes an undue burden on, and discriminates against interstate commerce, and is an attempted regulation of interstate commerce, all in violation of Article 1, Section 8 of the Federal Constitution.

Fifth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, unreasonably

and arbitrarily discriminates against freezer ships and floating cold storages in favor of shore based cold storages, which classification and discrimination is without reasonable justification, in violation of the Equal Protection, Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution, and Section 9 of the Organic Act, 48 U.S.C.A. 78, 37 Stat. 514, as amended.

Sixth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, is arbitrary, oppressive and confiscatory, and constitutes an attempted taking of its valuable property and denial of its right to fish and preserve fish, all in violation of the Due Process Clause of the Fifth and Fourteenth Amendments.

Wherefore, having fully answered, defendant prays, as follows:

1. That the plaintiff's complaint herein be dismissed;

2. For defendant's costs and attorneys' fees; and

3. For such other and further relief as to this court may appear meet and just.

EVANS, McLAREN, LANE,
POWELL & BEEKS,
Attorneys for Defendant
/s/ JOHN H. DIMOND
Of Counsel

Service and receipt of copy acknowledged.

[Endorsed]: Filed October 17, 1955.

[Title of District Court and Cause No. 7129-A.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, That we, Pacific Reefer Fisheries, the Defendant above named, as principal, and the Maryland Casualty Company, a corporation organized under the laws of the State of Maryland, and authorized to transact the business of surety in the Territory of Alaska, as surety, are held and firmly bound unto Territory of Alaska, the Plaintiff above named, in the just and full sum of Two Hundred Fifty and 00/100 ($250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of June, 1956.

The condition of this obligation is such, that whereas, the above named Plaintiff on the 21st day of May, 1956, in the above entitled action and court, recovered judgment against the Defendant above named for taxes, interest, and costs and whereas, the above named principal has heretofore given due and proper notice that it appeals from said decision and judgment of said United States Court of Appeals for the Ninth Circuit in and for District Court for the District of Alaska, First Judicial Division.

Now therefore, if the said principal Pacific Reefer Fisheries shall pay to Territory of Alaska, the Plaintiff above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars, then this obligation to be void; otherwise to remain in full force and effect.

PACIFIC REEFER FISHERIES,
/s/ By ROBERT BRESKOVICH

[Seal] MARYLAND CASUALTY COMPANY,
/s/ By A. M. NIKISCHER,
Attorney-in-Fact

Countersigned by:
/s/ (Illegible)
Resident Agent

[Endorsed]: Filed June 20, 1956.

[Endorsed]: No. 15284. United States Court of Appeals for the Ninth Circuit. Pacific Reefer and Pacific Reefer Fisheries, Appellants, vs. Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed: September 13, 1956.

Docketed: September 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the District Court for the District of Alaska
Division Number Three, at Anchorage

No. A-10,030

TERRITORY OF ALASKA, Plaintiff,

vs.

"PACIFIC QUEEN" and PACIFIC QUEEN FISHERIES, Defendant.

COMPLAINT

Comes now, the Plaintiff, and for its cause of action against the Defendant alleges:

I.

That the Territory of Alaska is a sovereign incorporated Territory organized under the laws of the United States.

II.

That the said Defendant during the years 1951, 1952 and 1953, failed to pay taxes due and owing Territory of Alaska.

III.

That by reason of the foregoing, Defendant owes Plaintiff the sum of $8,645.22, the same being taxes due the Plaintiff under the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951.

IV.

That Defendant, through wilful neglect, has failed to remit such tax when due, therefore there is now due and owing to Plaintiff, in addition to the

amount of such tax, the sum of $1,460.88, the same being a statutory penalty.

V.

That by reason of the fact that said tax was not paid when due, although demands have been made of the Defendant for the same, it is delinquent, and there is now due and owing to the Plaintiff, in addition to said tax and penalty:

(a) The sum of $561.46 representing interest on said tax at the rate of 6% per annum, accrued from the due date, January 15, 1952 to July 15, 1954, together with,

(b) interest on said taxes at the same rate from and after July 15, 1954, until paid.

VI.

That the total sum now due and owing Plaintiff from Defendant is $10,667.56, together with interest at 6% per annum on the sum of $8,645.22 from and after July 15, 1954, until paid.

VII.

That all conditions precedent necessary to the commencement of this action and to the fixing of Defendant's liability for such taxes, interest and penalties, have been performed by Plaintiff or have occurred.

Wherefore, Plaintiff prays that the court enter herein a decree as follows:

1. That Plaintiff have judgment against the Defendant for the total sum of $10,667.56 with interest on $8,645.22 at 6% per annum from July 15, 1954, until paid.

2. For a reasonable attorney's fee and the costs of this action.

3. For such other and further relief as to the court may seem meet and just.

Dated at Juneau, Alaska, this 12th day of July, 1954.

J. GERALD WILLIAMS,
Attorney General
/s/ By EDWARD A. MERDES,
Assistant Attorney General

Duly Verified.

[Endorsed]: Filed July 14, 1954.

[Title of District Court and Cause No. 7130-A.]

ANSWERS TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES

Comes now the defendant, Pacific Queen Fisheries, by August Mardesich, partner, who, having been duly sworn, in respect to the interrogatories heretofore served upon said defendant in the above case, makes the following answers:

No. 1:

1949	4,107 cases	48	1	#	Reds
	90 cases	48	1	#	Chums
1950	17,224 cases	48	½	#	Reds
	105 cases	48	½	#	Chums
1951	11,536 cases	48	½	#	Reds
	152 cases	48	½	#	Pinks
	129 cases	48	½	#	Chums
	2,023 cases	48	1	#	Kings

1952	152 cases	48	½ # Reds
	1,289 cases	48	1 # Reds
	1,853 cases	12	4 # Reds
	17 cases	48	1 # Pinks
	60 cases	48	1 # Chums
	10 cases	12	4 # Chums
1953	1,881 cases	48	½ # Reds
	6,428 cases	48	1 # Reds
	542 cases	48	1 # Pinks
	182 cases	48	1 # Chums
1954	8,647 cases	48	1 # Reds
	445 cases	48	1 # Pinks
	309 cases	48	1 # Chums
	1,040 cases	48	1 # Kings

No. 2: Defendant's answers to the original interrogatories herein are hereby amended to conform to the information furnished herewith:

1949	284,277 # Kings	(frozen)
	5,304 # Reds	(frozen)
1950	179,580 # Kings	(frozen)

1951—1954 None

Answers to Additional Interrogatories

No. 1: Washington Business and Occupation Tax

Tax Year	Amount

Seattle Business License Tax

Tax Year	Amount

Nos. 2, 3:

Alaska Business License Tax, Chapter 97, SLA 1949, as amended, paid to Department of Taxation, Juneau

1949 tax (paid 1950)	$1230.59
1950 tax (paid 1951)	586.41
1951 tax (paid January, 1952)	444.46
1952 tax (paid January, 1953)	604.93
1953 tax (paid January, 1954)	1,832.35
1954 tax (paid 1954)	25.00

No. 4: Defendant has no records which would enable it to answer this question, but believes that Salmon were caught both within and without a distance of three miles from mean low tide mark on the coastline of Alaska.

/s/ AUGUST MARDESICH,
Partner

Subscribed and sworn to before me this 5th day of September, 1955.

[Seal] /s/ GEORGE L. HULL,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed September 8, 1955.

[Title of District Court and Cause No. 7130-A.]

DEFENDANT'S AMENDED ANSWER TO ADDITIONAL INTERROGATORY No. 1

Comes now the defendant, Pacific Queen Fisheries, by August Mardesich, partner, who having been duly sworn, in respect to the interrogatories heretofore served upon said defendant in the above case, avers that through inadvertence, certain information was not submitted in response to Additional Interrogatory No. 1, and amends the answer heretofore served and filed to Additional Interrogatory No. 1, and makes the following answer thereto:

Washington Business and Occupation Tax

1949	1058.11
1950	7.42
1951	5.15
1952	1263.56
1953	403.90
1954	391.66

Seattle Business License Tax

1950	211.22
1951	424.00
1952	220.20
1953	39.62
1954	12.00

/s/ AUGUST MARDESICH,
Partner

Subscribed and sworn to before me this 13th day of September, 1955.

[Seal] GEORGE L. HULL,
Notary Public in and for the State of Washington, residing at Seattle.

Service and receipt of copy acknowledged.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause No. 7130-A.]

ANSWER AND COUNTER-CLAIM OF DEFENDANT PACIFIC QUEEN FISHERIES

Defendant Pacific Queen Fisheries answers plaintiff's complaint as follows:

First Defense

I.

Answering paragraph I of the complaint, defendant admits the same.

II.

Answering paragraph II of the complaint, defendant denies that during the tax years 1951, 1952 and 1953, or any of them, defendant failed to pay taxes to the Territory of Alaska.

III.

Answering paragraph III of the complaint, defendant denies that it owes the plaintiff the sum of $8,645.22, or any other amount whatever, for taxes due for the tax years 1951, 1952 and 1953, or any of them, under the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951.

IV.

Answering paragraph IV of the complaint, defendant denies that it has through wilful neglect failed to remit such tax and denies that there is due, as penalty or otherwise, the sum of $1,460.88, or any other amount whatever.

V.

Answering paragraph V of the complaint, defendant denies each and every allegation therein contained.

VI.

Answering paragraph VI of the complaint, defendant denies that there is now due and owing from it to plaintiff the sum of $10,667.56, or any other amount whatsoever.

VII.

Answering paragraph VII of the complaint, defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein and therefore denies the same.

Second Defense

I.

Defendant alleges that it is a partnership composed of the following individuals, each of whom is a citizen of the United States:

John Breskovich	John Vilicich
Mike Barovic	Nick Jasprica
Don Barovic	Nick Ursich
Joseph Mardesich	Madeline Ursich
Nick A. Mardesich	Louis Ursich
August Mardesich	John J. Petrich

William E. Peck

and that each of them is a resident of the State of Washington or of the State of California.

II.

Defendant alleges that it owns and operates the Diesel Electric Vessel Pacific Queen, a vessel registered under the laws of the United States under No. 257731 at the Port of Tacoma, Washington; that it purchased the vessel in 1948; that it has a large investment in the vessel; that it expended further sums in converting the vessel for use as a "freezer ship", primarily for employment in the freezing and transportation of salmon obtained on the high seas off the Coast of Alaska.

III.

Defendant alleges that, except as hereinafter specifically set forth, its operations were confined to the Bristol Bay red salmon season, in which the salmon obtained by the D/V Pacific Queen were caught by smaller gas-operated "catcher" boats having a maximum length of 32 feet and an approximate breadth of 10 feet; that in 1951, 1952 and 1953 all the "catcher" boats which delivered salmon to the D/V Pacific Queen were owned by and operated for the defendant; that the "catcher" boats employ the "gill-net" method of catching salmon; that the salmon caught by the said "catcher" boats in the years 1951, 1952 and 1953 have been taken partly within a line drawn parallel to and at a distance of three miles from the mean low tide mark on the coastline of Alaska, and partly outside that line; that all fish obtained by the D/V Pacific Queen in Bristol Bay were obtained while the D/V Pacific Queen was seaward of a line drawn parallel to and at a distance of three miles from the mean low tide mark on the coastline of Alaska; that in obtaining such fish the D/V Pacific Queen was operating on the high seas and outside the territorial jurisdiction of Alaska.

IV.

Defendant further alleges that in the year 1951 only the D/V Pacific Queen was operated during the Bristol Bay king salmon season; that the "catcher" boats operated by the D/V Pacific Queen fished for king salmon in the same manner set forth in paragraph III above; that during the 1951

king salmon season 6,827-½ king salmon were obtained by the D/V Pacific Queen for which the sum of $13,655.00 was paid to the fishermen; that in its operations during the 1951 king salmon season the D/V Pacific Queen did obtain fish at points within three miles of the coastline of Alaska.

V.

Defendant further alleges that in each of the years 1951, 1952 and 1953 the D/V Pacific Queen proceeded from Bristol Bay to the area of Kodiak Island at the conclusion of the Bristol Bay red salmon season; that in 1951 a "catcher" boat operated by Pacific Queen Fisheries caught 1368 fish by the beach-seining method, for which the sum of $188.79 was paid to the fishermen; that in 1952 a "catcher" boat operated by defendant caught 340 fish, for which the sum of $98.60 was paid to the fishermen; that in 1953, "catcher" boats operated by defendant caught 9,232 pink salmon and 99 chum salmon, for which the prices paid to the fishermen were $2,723.44 and $27.22, respectively; that the fish caught in the Kodiak area were loaded aboard the D/V Pacific Queen; that during operations in the Kodiak area the D/V Pacific Queen did obtain fish at points within three miles of the coastline of Alaska.

VI.

Defendant further alleges that the salmon loaded aboard the D/V Pacific Queen were frozen aboard the vessel to preserve them for transportation to the State of Washington where during the tax years

1951, 1952 and 1953 they were to be and have been canned and sold for further resale in interstate commerce.

VII.

Defendant further alleges that its operations for its fiscal year which included the 1951 tax year resulted in a net loss of $11,696.57; that its operations for the fiscal year including the 1952 tax year resulted in a net loss of $61,026.23; that its operations for its fiscal year including the 1953 tax year resulted in a let loss of $60,788.13.

VIII.

Defendant alleges that the plaintiff is seeking to apply the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, to activities of the defendant which are beyond the taxing jurisdiction of the Territory of Alaska in violation of Sections 3 and 9 of the Organic Act, 48 U.S.C.A. §§ 24 and 77, 37 Stat. 412, 514, as amended, and the due process clause of the Fifth and Fourteenth Amendments to the Constitution.

Third Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the activities of the defendant, would abridge, impair and deny to

defendant the right to take or preserve fish in waters in which fishing is permitted by the Secretary of the Interior, in violation of Section 1 of the Act of June 6, 1924, 48 U.S.C.A. 222, 43 Stat. 464, as amended, and Section 3 of the Organic Act, 48 U.S.C.A. 24, 37 Stat. 512, as amended.

Fourth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the operation of the defendant's D/V North Star is invalid and unconstitutional in that it imposes an undue burden on, and discriminates against interstate commerce, and is an attempted regulation of interstate commerce, all in violation of Article 1, Section 8, of the Federal Constitution.

Fifth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, unreasonably

and arbitrarily discriminates against freezer ships and floating cold storages in favor of shore based cold storages, which classification and discrimination is without reasonable justification, in violation of the Equal Protection, Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution and Section 9 of the Organic Act, 48 U.S.C.A. 78, 37 Stat. 514, as amended.

Sixth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, is arbitrary, oppressive and confiscatory, and constitutes an attempted taking of its valuable property and denial of its right to fish and preserve fish, all in violation of the Due Process Clause of the Fifth and Fourteenth Amendments.

First Counter-Claim

I.

Defendant repeats, and by this reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that heretofore, to-wit, on or about December 31, 1951 it paid to the plaintiff, through its agent, the Tax Commissioner, under protest, the sum of $419.46 on account of taxes for the year 1951, under Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951; that heretofore, to-wit, on or about January 15, 1953, it paid to the plaintiff through its agent, the Tax Commissioner, under protest, the sum of $579.93, for the tax year 1952 under the said tax; that heretofore, to-wit, on or about May 10, 1954, it paid to the plaintiff through its agent, the Tax Commissioner, under protest, the sum of $1,807.35, for the tax year 1953, under the said tax; that the defendant had theretofore paid under protest an initial license fee of $25.00 for each of the years 1951, 1952 and 1953; that no part of the sums so paid were due and owing to the plaintiff and the defendant is therefore entitled to a refund in the amount of $2,881.47, together with interest thereon from the date of payment, under the provisions of Section 47-7-1, A.C.L.A. 1949.

Second Counter-Claim

I.

Defendant repeats and by reference incorporates herein each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that heretofore, to-wit, on or about December 31, 1951, it paid to the plaintiff

through its agent, the Tax Commissioner, the sum of $419.46; that on or about January 15, 1953 it paid to the plaintiff through its agent, the Tax Commissioner, the sum of $579.93; that on or about May 10, 1954 it paid to the plaintiff through its agent, the Tax Commissioner, the sum of $1,807.35; that it had theretofore paid an initial license fee of $25.00 for each of the years 1951, 1952 and 1953; that the sums so paid in the total amount of $2,881.47 were an overpayment through error of the tax, if any, legally imposed under Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, and defendant is therefore entitled to a refund in the amount of such overpayment as the court may find to have been made, with interest from the date of payment under the provisions of Section 48-7-1, A.C.L.A. 1949.

Wherefore, having fully answered, defendant prays as follows:

1. That the plaintiff's complaint herein be dismissed;

2. That defendant recover judgment on its counter-claims against the plaintiff in the sum of $2,881.47, or such smaller amount as the court may find to be due, with interest from the respective dates of payment;

3. For defendant's costs and attorneys' fees; and

4. For such other and further relief as to this court may appear meet and just.

EVANS, McLAREN, LANE,
POWELL & BEEKS,
Attorneys for Defendant
/s/ JOHN H. DIMOND,
Of Counsel.

Acknowledgment of Service Attached.
[Endorsed]: Filed October 17, 1955.

[Title of District Court and Cause No. 7130-A.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, That we, Pacific Queen and Pacific Queen Fisheries, the Defendants above named, as principal, and the Maryland Casualty Company, a corporation organized under the laws of the State of Maryland, and authorized to transact the business of surety in the Territory of Alaska, as surety, are held and firmly bound unto Territory of Alaska, the Plaintiff above named, in the just and full sum of Two Hundred Fifty and 00/100 ($250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of June, 1956.

The condition of this obligation is such, that whereas, the above named Plaintiff on the 21st day of May, 1956, in the above entitled action and court, recovered judgment against the Defendants above named for taxes, interest, and costs.

And whereas, the above named principals have heretofore given due and proper notice that they

appeal from said decision and judgment of said United States Court of Appeals for the Ninth Circuit in and for District Court for the District of Alaska, First Judicial Division.

Now therefore, if the said principal Pacific Queen and Pacific Queen Fisheries shall pay to Territory of Alaska the Plaintiff above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars, then this obligation to be void; otherwise to remain in full force and effect.

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES,

/s/ By ROBERT BRESKOVICH

[Seal] MARYLAND CASUALTY COMPANY,

/s/ By A. M. NIKISCHER,
Attorney-in-Fact

Countersigned by: (illegible) Local Agent

[Endorsed]: Filed June 20, 1956.

[Endorsed]: No. 15285. United States Court of Appeals for the Ninth Circuit. Pacific Queen and Pacific Queen Fisheries, Appellants, vs. Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed: September 13, 1956.

Docketed: September 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the District Court for the District of Alaska
Division Number Three, At Anchorage

No. A-10,031

TERRITORY OF ALASKA Plaintiff,

vs.

"ALASKA REEFER" and ALASKA REEFER FISHERIES Defendant.

COMPLAINT

Comes Now, the Plaintiff, Territory of Alaska, and for its cause of action against the Defendant above named, alleges:

I.

That the Territory of Alaska is a sovereign incorporated Territory organized under the laws of the United States.

II.

That the said Defendant, during the years 1951, 1952 and 1953 failed to pay taxes due and owing the Territory of Alaska.

III.

That by reason of the foregoing, Defendant owes Plaintiff the sum of $4,778.33, the same being taxes due the Plaintiff under the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951.

IV.

That Defendant, through wilfull neglect, has failed to remit such tax when due, therefore there

is now due and owing to Plaintiff, in addition to the amount of such tax, the sum of $1,298.00, the same being a statutory penalty.

V.

That by reason of the fact that said tax was not paid when due, although demands have been made of the Defendant for the same, it is delinquent, and there is now due and owing to the Plaintiff, in addition to said tax and penalty:

(a) The sum of $624.75 representing interest on said tax at the rate of 6% per annum, accrued from the due date Jan. 15, 1952 to July 15, 1954, together with,

(b) interest on said taxes at the same rate from and after July 15, 1954, until paid.

VI.

That the total sum now due and owing Plaintiff from Defendant is $6,701.08, together with interest at 6% per annum on the sum of $4,778.33 from and after July 15, 1954, until paid.

VII.

That all conditions precedent necessary to the commencement of this action and to the fixing of Defendant's liability for such taxes, interest and penalties, have been performed by Plaintiff or have occurred.

Wherefore, Plaintiff prays that the court enter herein a decree as follows:

1. That Plaintiff have judgment against the Defendant for the total sum of $6,701.08 with interest

on $4,778.33 at 6% per annum from July 15, 1954, until paid.

2. For a reasonable Attorney's fee and the costs of this action.

3. For such other and further relief as to the court may seem meet and just.

Dated at Juneau, Alaska this 12th day of July 1954.

J. GERALD WILLIAMS
Attorney General
/s/ By EDWARD A. MERDES
Assistant Attorney General

Duly Verified.

[Endorsed]: Filed July 14, 1954.

[Title of District Court and Cause No. 7131-A.]

ANSWER

Defendant, Alaska Reefer Fisheries, answers plaintiff's complaint as follows:

First Defense

1. Answering paragraph I of the Complaint, defendant admits the same.

2. Answering paragraph II of the Complaint, defendant denies that during the tax years 1951, 1952 and 1953, or any of them, defendant failed to pay taxes to the Territory of Alaska.

3. Answering paragraph III of the Complaint, defendant denies that it is liable for the sum of $4,778.33, or any other amount whatever for taxes

due for the tax years 1951, 1952 and 1953, or any of them, under the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951.

4. Answering paragraph IV of the Complaint, defendant denies that it has through wilfull neglect failed to remit such tax and therefore denies that there is due as penalty or otherwise the sum of $1,298.00, or any other amount whatsoever.

5. Answering paragraph V of the Complaint, defendant denies each and every allegation therein contained.

6. Answering paragraph VI of the Complaint, defendant denies that there is now due and owing from it to plaintiff the sum of $6,701.08, or any other amount whatsoever.

7. Answering paragraph VII of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

Second Defense

1. Defendant alleges that it is a partnership composed of the following individuals, each of whom is a citizen of the United States:

Andrew Vilicich;
John Vilicich;
Steve Vilicich; and
Anton Bulich,

and that each of them is a citizen and resident of the State of California.

2. Defendant alleges that it owns and operates the Diesel Electric Vessel "Alaska Reefer," a vessel registered under the laws of the United States under No. 261816, at the Port of Tacoma, Washington; that it purchased the vessel in 1950; that it has a large investment in the same; and that it expended further sums in converting the vessel for use as a "freezer ship," primarily for employment in the freezing and transportation of salmon obtained on the high seas off the Coast of Alaska.

3. Defendant further alleges that the salmon obtained by the D/V Alaska Reefer are caught by smaller gas- operated "catcher" boats of a maximum length of 30 feet and maximum breadth of 10 feet, which boats are also owned by and operated for the defendant; that the "catcher" boats employ the "gill-net" method of catching salmon; and that the salmon caught by the "catcher" boats operated by the defendant in the tax years 1951, 1952 and 1953 have been taken partly within a line drawn parallel to and at a distance of three miles from the mean low tide mark on the coastline of Alaska, and partly outside that line.

4. Defendant alleges that the D/V Alaska Reefer has not, during the years 1951, 1952 and 1953, obtained any fish other than from "catcher" boats operated by defendant, and that, except as specifically set forth herein, all fish obtained by the D/V Alaska Reefer were obtained while the D/V Alaska Reefer was seaward of a line drawn parallel to and at a distance of three miles from the mean low tide mark on the coastline of Alaska; that in

obtaining such fish, the D/V Alaska Reefer was operating on the high seas and outside the territorial jurisdiction of Alaska; that in June, 1951, the D/V Alaska Reefer did obtain king salmon at points within three miles of the shore of Alaska; that the number of fish thus obtained did not exceed 5209 and that the value of such raw fish did not exceed $11,136.62, which sum includes the price paid to the fishermen, $2.00 per king salmon, together with indirect costs of $0.13815 per fish.

5. Defendant further alleges that the salmon obtained for processing through freezing aboard the D/V Alaska Reefer were frozen aboard the vessel to preserve them for transportation to the State of Washington, where during the tax years 1951, 1952 and 1953, they were to be and have been canned and sold for further resale in inter-state commerce.

6. Defendant further alleges that its operations for its fiscal year which included the 1951 tax year resulted in a net loss of $2,788.59; that its operations for the fiscal year including the 1952 tax year resulted in a net profit of $1,327.67; and that its operations for the fiscal year including the 1953 tax year, resulted in a net loss of $15,694.00.

7. Defendant alleges that the plaintiff is seeking to apply the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, to activities of the defendant which are beyond the taxing jurisdiction of the Territory of Alaska in violation of Sections 3 and 9 of the Organic Act, 48 U.S.C.A. 24 and 77, 37 Stat. 512, 514, as amended, and the Due

Process Clause of the 5th and 14th Amendments to the Constitution.

Third Defense

1. Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses above.

2. Defendant alleges that the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the activities of the defendant, would abridge, impair and deny to defendant the right to take or preserve fish in waters in which fishing is permitted by the Secretary of the Interior, in violation of Section 1 of the Act of June 6, 1924, 48 U.S.C.A. 222, 43 Stat. 464, as amended, and Section 3 of the Organic Act, 48 U.S.C.A. 24, 37 Stat. 512, as amended.

Fourth Defense

1. Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

2. Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the operation of the defendant's D/V Alaska Reefer is invalid and unconstitutional in that it imposes an undue burden on, and discriminates against interstate commerce, and is an attempted regulation of

interstate commerce, all in violation of Article 1, Section 8 of the Federal Constitution.

Fifth Defense

1. Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

2. Defendant alleges that Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951 unreasonably and arbitrarily discriminates against freezer ships and floating cold storages in favor of shore based cold storages, which classification and discrimination is without reasonable justification, in violation of the Equal Protection, Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution and Section 9 of the Organic Act, 48 U.S.C.A. 78, 37 Stat. 514, as amended.

Sixth Defense

1. Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

2. Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, is arbitrary, oppressive and confiscatory, and constitutes an attempted taking of its

valuable property and denial of its right to fish and preserve fish, all in violation of the Due Process Clause of the 5th and 14th Amendments.

And For Separate and Alternative Causes of Action and Counterclaims herein, defendant admits, denies, and alleges as follows:

First Counterclaim

1. Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

2. Defendant alleges that heretofore, to-wit, on the 31st day of March, 1954, it paid to the plaintiff, through its agent, the Tax Commissioner, under protest, the sum of $2,155.07 on account of taxes, penalties and interest, assessed against it by the Commissioner, for the years 1951, 1952 and 1953, under Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, and that defendant had theretofore paid, under protest, an initial license fee of $25.00 for each of the years 1951, 1952 and 1953, no part of which sum was due and owing to the plaintiff, and defendant is therefore entitled to a refund in the amount of $2,230.07, with interest thereon from the date of payment, under the provisions of Sec. 48-7-1 ACLA 1949.

Second Counterclaim

1. Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

2. Defendant alleges that heretofore, to-wit on

the 31st day of March, 1954, it paid to the plaintiff, through its agent, the Tax Commissioner, the sum of $2,155.07, being an overpayment through error of the tax, if any, legally imposed under Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, and that defendant had theretofore paid an initial license fee of $25.00 for each of the years 1951, 1952 and 1953, and defendant is therefore entitled to a refund in the amount of such overpayment as the Court may find to have been made, with interest from the date of payment, under the provisions of Sec. 48-7-1 ACLA 1949.

Wherefore, having fully answered, defendant prays as follows:

1. That plaintiff's Complaint herein be dismissed;

2. That defendant recover judgment on its counterclaims against plaintiff, in the sum of $2,230.07, or such smaller amount as the Court may find to be due, with interest from March 31, 1954;

3. For defendant's costs and attorneys' fees; and

4. For such other and further relief as to this Court may appear meet and just.

EVANS, McLAREN, LANE,
POWELL & BEEKS
Attorneys for defendant.

/s/ By JOHN H. DIMOND
Of Counsel.

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 13, 1954.

[Title of District Court and Cause No. 7131-A.]

DEFENDANT'S ANSWERS TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES

Now comes defendant, by John Vilicich, partner, who, having been duly sworn, in response to the interrogatories served upon defendant in the above case makes the following answers:

No. 1: Washington Business and Occupation Tax

1951	$ 63.98
1952	940.27
1953	1,025.42
1954	667.05

1951, 1952, 1953, 1954 City of Tacoma business license taxes—None.

Nos. 2, 3: Alaska Business License Tax, Chapter 97, SLA 1949, as amended, paid to Department of Taxation, Juneau:

1951 tax (paid March, 1954)	$834.00
1952 tax (paid March, 1954)	944.97
1953 tax (paid March, 1954)	451.10
1954 tax (paid May, 1954)	25.00

No. 4: Defendant has no records which would enable it to answer this question, but believes that salmon were caught both within and without a

distance of three miles from mean low tide mark on the coastline of Alaska.

/s/ JOHN VILICICH
Partner

Subscribed and sworn to before me this 6th day of September, 1955.

[Seal] /s/ GEORGE L. HULL
Notary Public in and for the State of Washington, residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed Sept. 8, 1955.

[Title of District Court and Cause No. 7131-A.]

COSTS ON APPEAL

Know All Men By These Presents:

That we, Alaska Reefer Fisheries, the Defendant above named, as Principal, and Glens Falls Insurance Company, of Glens Falls, New-York, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the Territory of Alaska, as surety, are held and firmly bound unto Territory of Alaska, the Plaintiff above named in the just and full sum of Two Hundred and Fifty Dollars and No/100 ($250.00) Dollars for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents,

Sealed with our seals and dated this 14th day of June, 1956.

The condition of this obligation is such, that whereas, the above named Plaintiff, on the 21st day of May, A.D., 1956, in the above entitled action and court, recovered judgment against the Defendant above named for the sum of Sixteen Thousand, Two Hundred Eighty Seven and 83/100 Dollars ($16,287.83) Plus Interest.

And Whereas, the above named principal has heretofore given due and proper notice that they appeal from said decision and judgment of said District Court for District of Alaska, 1st Judicial Division, to the United States Court of Appeals for the 9th Circuit.

Now, Therefore, If the said principal, Alaska Reefer Fisheries shall pay to Territory of Alaska, the plaintiff above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100 Dollars ($250.00) then this obligation to be void; otherwise to remain in full force and effect.

ALASKA REEFER FISHERIES
By JOHN VILICICH
/s/ By M. J. DEIGNAN
Attorney-In-Fact for Alaska Fisheries
GLENS FALLS INSURANCE COMPANY
/s/ By N. B. YOUNG
Attorney

Countersigned:

[Seal] /s/ R. E. ROBERTSON
Alaskan Agent.

Power of Attorney Attached.

[Endorsed]: Filed June 25, 1956.

[Endorsed]: No. 15286. United States Court of Appeals for the Ninth Circuit. Alaska Reefer and Alaska Reefer Fisheries, Appellants vs. Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed: September 13, 1956.

Docketed: September 19, 1956.

/s/ PAUL P. O'BRIEN
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the District Court for the District of Alaska
Division Number Three, at Anchorage

No. A-10,032

TERRITORY OF ALASKA Plaintiff,

vs.

"NORTH STAR" and NORTH STAR FISHERIES, Defendant.

COMPLAINT

Comes Now, the Plaintiff, Territory of Alaska, and for its cause of action against the Defendant above named, alleges:

I.

That the Territory of Alaska is a sovereign incorporated Territory organized under the laws of the United States.

II.

That the said Defendant, during the years 1951, 1952 and 1953 failed to pay taxes due and owing the Territory of Alaska.

III.

That by reason of the foregoing, Defendant owes Plaintiff the sum of $13,223.37, the same being taxes due the Plaintiff under the provisions of Chapter 97, SLA, 1949, as amended by Chapter 116, SLA 1951.

IV.

That Defendant, through wilfull neglect, has

failed to remit such tax when due, therefore there is now due and owing to Plaintiff, in addition to the amount of such tax, the sum of $3,075.48, the same being a statutory penalty.

V.

That by reason of the fact that said tax was not paid when due, although demands have been made of the Defendant for the same, it is delinquent, and there is now due and owing to the Plaintiff, in addition to said tax and penalty:

(a) The sum of $793.93 representing interest on said tax at the rate of 6% per annum, accrued from the due date, 1/15/1952 to 7/15/1954, together with,

(b) interest on said taxes at the same rate from and after 7/15/1954, until paid.

VI.

That the total sum now due and owing Plaintiff from Defendant is $16,092.78, together with interest at 6% per annum on the sum of $13,223.37 from and after 7/15/1954, until paid.

VII.

That all conditions precedent necessary to the commencement of this action and to the fixing of Defendant's liability for such taxes, interest and penalties, have been performed by Plaintiff or have occurred.

Wherefore, Plaintiff prays that the court enter herein a decree as follows:

1. That Plaintiff have judgment against the De-

fendant for the total sum of $16,092.78 with interest on $13,223.37 at 6% per annum from 7/15/1954, until paid.

2. For a reasonable Attorney's fee and the costs of this action.

3. For such other and further relief as to the court may seem meet and just.

Dated at Juneau, Alaska, this 12th day of July, 1954.

J. GERALD WILLIAMS
Attorney General
/s/ By EDWARD A. MERDES
Assistant Attorney General

Duly Verified.

[Endorsed]: Filed July 14, 1954.

[Title of District Court and Cause No. 7132-A.]

DEFENDANT'S ANSWERS TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES

Comes now the defendant, North Star Fisheries, by August Mardesich, partner, who, having been duly sworn, in response to the interrogatories served upon said defendant in the above case, makes the following answers:

No. 1:	1951	16,229	cases	48 ½	# Reds
		729	cases	48 1	# Pinks
		45	cases	48 1	# Chums
		161	cases	48 ½	# Chums
	1952	7,389	cases	48 ½	# Reds
		9,881	cases	24 1	# Reds
		6,135	cases	48 1	# Reds

1952	1,769	cases	12	4 #	Reds
	862	cases	48	½ #	Pinks
	1,156	cases	48	1 #	Pinks
	1,353	cases	12	4 #	Pinks
	443	cases	48	½ #	Chums
	4,270	cases	48	1 #	Chums
	52	cases	12	4 #	Chums
	2	cases	48	½ #	Cohoes
	37	cases	48	1 #	Cohoes
	3	cases	48	½ #	Blackmouth
	1	case	48	1 #	Blackmouth
1953	2,588	cases	48	½ #	Reds
	5,112	cases	24	1 #	Reds
	9,789	cases	48	1 #	Reds
	1,661	cases	48	½ #	Pinks
	6,704	cases	48	1 #	Pinks
	147	cases	48	½ #	Chums
	625	cases	48	1 #	Chums
1954	419	cases	48	½ #	Reds
	1,500	cases	24	1 #	Reds
	13,942	cases	48	1 #	Reds
	9,041	cases	48	½ #	Pinks
	17	cases	48	1 #	Pinks
	2,464	cases	48	½ #	Chums
	338	cases	48	1 #	Chums
	103	cases	48	½ #	Cohoes
	22	cases	48	1 #	Cohoes

No. 2: None of the fish caught were sold in either the frozen or the fresh fish market, or other than canned.

Answers to Additional Interrogatories

No. 1: Washington Business and Occupation Tax
Seattle Business License Tax

Nos. 2, 3: Alaska Business License Tax, Chapter 97, SLA, 1949, as amended, paid to Department of Taxation, Juneau:

1951 tax (paid January, 1952)	$ 448.47
1952 tax (paid January, 1953)	1,309.94
1953 tax (paid May, 1953)	25.00
1954 tax (paid May, 1954)	25.00

No. 4: Defendant has no records which would enable it to answer this question, but believes that salmon were caught both within and without a distance of three miles from mean low tide mark on the coastline of Alaska.

/s/ AUGUST MARDESICK
Partner

Suberibed and sworn to before me this 5th day of September, 1955.

[Seal] /s/ GEORGE L. HULL
Notary Public in and for the State of Washington, residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed Sept. 8, 1955.

[Title of District Court and Cause No. 7132-A.]

DEFENDANT'S AMENDED ANSWER TO ADDITIONAL INTERROGATORY No. 1

Comes now the defendant, North Star Fisheries, by August Mardesich, partner, who having been duly sworn, in respect to the interrogatories heretofore served upon said defendant in the above case avers that through inadvertence, certain information was not submitted in response to Additional Interrogatory No. 1, and amends the answer heretofore served and filed to Additional Interrogatory No. 1, and makes the following answer thereto:

Washington Business and Occupation Tax

1951	$ 11.59
1952	1298.13
1953	1923.12
1954	1513.88

Seattle Business License Tax

1951	$ 6.57
1952	172.97
1953	130.86
1954	6.43

/s/ AUGUST MARDESICH,
Partner

Subscribed and sworn to before me this 13th day of September, 1955.

[Seal] /s/ GEORGE L. HULL,
Notary Public in and for the State of Washington, residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed Sep. 19, 1955.

[Title of District Court and Cause No. 7132-A.]

ANSWER AND COUNTER-CLAIM OF DEFENDANT NORTH STAR FISHERIES

Answer

Defendant North Star Fisheries answers plaintiff's complaint as follows:

First Defense

I.

Answering paragraph I of the complaint, defendant admits the same.

II.

Answering paragraph II of the complaint, defendant denies that during the tax years 1951, 1952 and 1953, or any of them, defendant failed to pay taxes to the Territory of Alaska.

III.

Answering paragraph III of the complaint, defendant denies that it owes the plaintiff the sum of $13,223.37, or any other amount whatever, for taxes due for the tax years 1951, 1952 and 1953, or any of them, under the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951.

IV.

Answering paragraph IV of the complaint defendant denies that it has through wilful neglect failed to remit such tax and therefore denies that there is due as a penalty or otherwise the sum of $3,075.48, or any other amount whatsoever.

V.

Answering paragraph V of the complaint defendant denies each and every allegation therein contained.

VI.

Answering paragraph VI of the complaint, defendant denies that there is now due and owing from it to plaintiff the sum of $16,092.78, or any other amount whatsoever.

VII.

Answering paragraph VII of the complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

Second Defense

I.

Defendant alleges that it is a partnership composed of the following individuals, each of whom is a citizen of the United States:

August Mardesich; Nick A. Mardesich; Joseph Mardesich; George Hull; Mike Barovic; Beverly Pearl Barovic; Western Boat Building Company, a partnership composed of Martin, Allen, Hervey, John and James Petrich and Martin Petrich, Jr.; and that each of them is a citizen and resident of the State of Washington.

II.

Defendant alleges that it owns and operates the diesel electric vessel North Star, a vessel registered under the laws of the United States under Number

261698 at the Port of Tacoma, Washington; that it purchased the vessel in 1951; that it has a large investment in the same; and that it expended further sums in converting the vessel for use as a "freezer ship", primarily for employment in the freezing and transportation of salmon obtained on the high seas off the coast of Alaska.

III.

Defendant alleges that except as hereinafter specifically set forth its operations were confined to Bristol Bay, where the salmon obtained by the D/V North Star were caught by smaller gas-operated "catcher" boats having a maximum length of thirty-two feet and an approximate breadth of ten feet, which boats are also owned by and operated for the defendant; that the "catcher" boats employ the "gill-net" method of catching salmon; and that the salmon caught by the "catcher" boats operated by the defendant in the tax years 1951, 1952 and 1953 have been taken partly within a line drawn parallel to and at a distance of three miles from the mean low tide mark on the coastline of Alaska, and partly outside that line; that all fish obtained by the D/V North Star in Bristol Bay were obtained while the D/V North Star was seaward of a line drawn parallel to and at a distance of 3 miles from the mean low tide mark on the coastline of Alaska; that in obtaining such fish the D/V North Star was operating on the high seas and outside the territorial jurisdiction of Alaska.

IV.

Defendant further alleges that salmon were obtained by the D/V North Star elsewhere than in the Bristol Bay area, and in the manner set forth in paragraph III above, only as follows: that at the close of the 1951, 1952 and 1953 Bristol Bay seasons, the D/V North Star proceeded to the Kodiak area, where the defendant's catcher boats engaged in fishing by the beach-seining method; that the number of the fish so obtained and the price paid to the fishermen therefor were as follows:

1951	—	11,530 fish	—	$ 4,238.17
1952	—	53,936 fish	—	$10,956.32
1953	—	133,559 fish	—	$39,328.76

That in the fall of 1952 the D/V North Star proceeded to the area of Southeastern Alaska where an unknown number of fish were purchased from independent fishermen, for the total sum of $24,315.30; that during operations in Kodiak and in Southeastern Alaska the D/V North Star did obtain fish at points within three miles of the coastline of Alaska.

V.

Defendant further alleges that the salmon loaded aboard the D/V North Star were frozen aboard the vessel to preserve them for transportation to the State of Washington, where during the tax years 1951, 1952 and 1953, they were to be and have been canned and sold for further resale in interstate commerce.

VI.

Defendant further alleges that its operations for

its fiscal year covering the 1951 tax year resulted in a net loss of $31,031.58; that its operations for the fiscal year covering the 1952 tax year resulted in a net profit of $7,527.63; that its operations for the fiscal year covering the 1953 tax year resulted in a net profit of $33,323.94; that in the years 1951 and 1953 its gross income was increased in the amounts of $1,294.68 and $146,018.83 respectively, by charter hire from the chartering of the D/V North Star for operation other than in the Alaskan area; that the profit for 1953 does not reflect a profitable Alaskan operation but rather the ability of the defendant to charter the North Star during another part of the year; that defendant has unsuccessfully attempted to make similar arrangements in other years; that the above figures do not take into account the tax liability which is the subject matter of this suit.

VII.

Defendant alleges that the plaintiff is seeking to apply the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, to activities of the defendant which are beyond the taxing jurisdiction of the Territory of Alaska in violation of Sections 3 and 9 of the Organic Act, 48 U.S.C.A. §§ 24 and 77, 37 Stat. 512, 514, as amended, and the due process clause of the Fifth and Fourteenth Amendments to the Constitution.

Third Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that the provisions of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the activities of the defendant, would abridge, impair and deny to defendant the right to take or preserve fish in waters in which fishing is permitted by the Secretary of the Interior, in violation of Section 1 of the Act of June 6, 1924, 48 U.S.C.A. 222, 43 Stat. 464, as amended, and Section 3 of the Organic Act, 48 U.S.C.A. 24, 37 Stat. 512, as amended.

Fourth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, as sought to be applied to the operation of the defendant's D/V North Star is invalid and unconstitutional in that it imposes an undue burden on, and discriminates against interstate commerce, and is an attempted regulation of interstate commerce, all in violation of Article 1, Section 8 of the Federal Constitution.

Fifth Defense

I.

Defendant repeats, and by reference incorporates

herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951 unreasonably and arbitrarily discriminates against freezer ships and floating cold storages in favor of shore based cold storages, which classification and discrimination is without reasonable justification, in violation of the Equal Protection, Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution and Section 9 of the Organic Act, 48 U.S.C.A. 78, 37 Stat. 514, as amended.

Sixth Defense

I.

Defendant repeats, and by reference incorporates herein, each and every allegation, denial and admission of its First and Second Defenses, above.

II.

Defendant alleges that the tax imposed in respect to freezer ships and floating cold storages by Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, is arbitrary, oppressive and confiscatory, and constitutes an attempted taking of its valuable property and denial of its right to fish and preserve fish, all in violation of the Due Process Clause of the Fifth and Fourteenth Amendments.

First Counter-Claim

I.

Defendant repeats and by reference incorporates herein each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that heretofore, to-wit, on or about January 2, 1952, it paid to the plaintiff through its agent, the Tax Commissioner, under protest, the sum of $423.47 on account of taxes, for the year 1951, under Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951; that heretofore, to-wit, on or about the 15th day of January, 1953 it paid to the plaintiff through its agent, the Tax Commissioner, under protest, the sum of $1,284.94 on account of taxes for the year 1952, under the said tax; that defendant had theretofore paid under protest an initial license fee of $25.00 for each of the years 1951 and 1952; that the defendant has heretofore paid under protest an initial license fee of $25.00 for the year 1953; that no part of sums so paid were due and owing to the plaintiff and the defendant is therefore entitled to a refund in the amount of $1,783.41, with interest thereon from the date of payment under the provisions of Section 48-7-1, ACLA, 1949.

Second Counter-Claim

I.

Defendant repeats and by reference incorporates herein each and every allegation, denial and admission of its First and Second Defenses above.

II.

Defendant alleges that heretofore, to-wit, on or about January 2, 1952 it paid to the plaintiff through its agent, the Tax Commissioner, the sum of $423.47; that on or about January 15, 1953 it paid to the plaintiff through its agent, the Tax Commissioner, the sum of $1,284.94; that it had theretofore paid an initial license fee of $25.00 for each of the years 1951 and 1952; that it has heretofore paid an initial license fee of $25.00 for the year 1953; that the sums so paid in the total amount of $1,783.41 were an overpayment through error of the tax, if any, legally imposed under Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, and defendant is therefore entitled to a refund in the amount of such overpayment as the court may find to have been made, with interest from the date of payment under the provisions of Section 48-7-1, A.C.L.A. 1949.

Wherefore, having fully answered, defendant prays as follows:

1. That the plaintiff's complaint herein be dismissed:

2. That defendant recover judgment on its counter-claims against the plaintiff in the sum of $1,783.41, or such smaller amount as the court may find to be due, with interest from the respective dates of payment;

3. For defendant's costs and attorneys' fees; and

4. For such other and further relief as to this court may appear meet and just.

EVANS, McLAREN, LANE,
POWELL & BEEKS,
Attorneys for Defendant
/s/ JOHN H. DIMOND,
Of Counsel

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 17, 1955.

[Title of District Court and Cause No. 7132-A.]

COSTS ON APPEAL

Know All Men By These Presents:

That we, North Star and North Star Fisheries, the Defendant above named, as Principal and Glens Falls Insurance Company, of Glens Falls, New York, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the Territory of Alaska, as surety, are held and firmly bound unto Territory of Alaska, the Plaintiff above named in the just and full sum of Two Hundred Fifty and No/100 Dollars ($250.00) for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of June, 1956.

The condition of this obligation is such, that whereas, the above named Plaintiff, on the 21st day of May, A. D., 1956, in the above entitled action and

court, recovered judgment against the Defendant above named for the sum of Thirty Four Thousand, Eight Hundred Twenty and 50/100 Dollars ($34,820.50) Plus Interest.

And Whereas, the above named Principal has heretofore given due and proper notice that they appeal from said decision and judgment of said District Court for District of Alaska, 1st Judicial Division, to the United States Court of Appeals for the 9th Circuit.

Now, Therefore, If the Said Principal, North Star and North Star Fisheries shall pay to Territory of Alaska, the plaintiff above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100 Dollars ($250.00) then this obligation to be void; otherwise to remain in full force and effect.

NORTH STAR and
NORTH STAR FISHERIES;
/s/ By JOHN H. DIMOND,
Attorney for North Star and North Star Fisheries
GLEN FALLS INSURANCE COMPANY,
/s/ By W. E. HARRIMAN,
Attorney
Countersigned
/s/ By R. E. ROBERTSON,
[Seal] Alaskan Agent
Power of Attorney Attached.
[Endorsed]: Filed June 25, 1956.

[Endorsed]: No. 15287. United States Court of Appeals for the Ninth Circuit. North Star and North Star Fisheries, Appellants, vs. Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed: September 13, 1956.

Docketed: September 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the District Court for the District of Alaska,
Division Number One at Juneau

No. 7143-A

TERRITORY OF ALASKA, Plaintiff,

vs.

NORTHERN REEFER COMPANY; GRIMES PACKING COMPANY; and REEFER II (a vessel), Defendants.

COMPLAINT

Comes Now, the Plaintiff, and for its cause of action against the Defendants alleges:

I.

That the Territory of Alaska is a sovereign incorporated Territory organized under the laws of the United States.

II.

That the Defendant Reefer II is a vessel employed by the Defendants in Alaskan waters as a floating freezer ship.

III.

That the said Defendants above named during the tax years 1952 and 1953 failed to pay taxes due the Territory.

IV.

That said Defendants jointly and severally owe the Plaintiff and are liable for the sum of $6,028.27, the same being taxes due under the provisions of Chapter 97 SLA 1949 as amended by Chapter 116 SLA 1951.

V.

That Defendants, through willful neglect, have failed to remit such tax when due, therefore there is now due and owing to Plaintiff, in addition to the amount of such tax, the sum of $1,507.07, the same being a statutory penalty.

VI.

That by reason of the fact that said tax was not paid when due, although demands have been made of the Defendant for the same, it is delinquent, and there is now due and owing to the Plaintiff, in addition to said tax and penalty:

(a) The sum of $347.59 representing interest on said tax at the rate of 6% per annum, accrued from the due date, January 15, 1953 to July 15, 1954, together with,

(b) interest on said taxes at the same rate from and after July 15, 1954, until paid.

VII.

That the total sum now due and owing Plaintiff from Defendant is $7,882.93 together with interest at 6% per annum on the sum of $6,028.27 from and after July 15, 1954, until paid.

VIII.

That all conditions precedent necessary to the commencement of this action and to the fixing of Defendants' liability for such taxes, interest and penalties, have been performed by Plaintiff or have occurred.

Wherefore, Plaintiff prays that the court enter herein a decree as follows:

1. That Plaintiff have judgment against the Defendants for the total sum of $7,882.93 with interest on $6,028.27 at 6% per annum from July 15, 1954 until paid.

2. For a reasonable attorney's fee and the costs of this action.

3. For such other and further relief as to the court may seem meet and just.

Dated at Juneau, Alaska, this 10th day of Sept., 1954.

J. GERALD WILLIAMS,
Attorney General,
/s/ By EDWARD A. MERDES,
Assistant Attorney General

Duly Verified.

[Endorsed]: Filed Sept. 10, 1954.

[Title of District Court and Cause No. 7143-A.]

AMENDED COMPLAINT

Comes Now, the Plaintiff, and for its first claim, complains and alleges as follows:

I.

That the Territory of Alaska is a sovereign incorporated Territory organized under the laws of the United States.

II.

That the vessel Reefer II was employed in Alaskan waters by the Defendants Grimes Packing Company and Northern Reefer Company as a floating freezer ship, engaged in the purchasing and

freezing in Alaska of salmon caught in Alaskan waters.

III.

That the said vessel, during the tax years 1952-1953, was owned by Defendant, Grimes Packing Company, and during said years, to the best information of Plaintiff, was engaged in the purchasing and freezing in Alaska of salmon caught in Alaskan waters.

IV.

That the Defendant, Grimes Packing Company, failed to make or file a tax return, or pay its taxes for the tax years 1952-1953.

V.

That the best estimate of the taxes owing the Territory by said Defendant, Grimes Packing Company is the amount of $6,028.27, the same being taxes levied by Chapter 97 SLA 1949, as amended by Chapter 116 SLA 1951.

VI.

That said Defendant, through willful neglect, has failed to remit such tax when due, therefore there is now due and owing to Plaintiff, in addition to the amount of such tax, the sum of $1,507.07, the same being a statutory penalty.

VII.

That by reason of the fact that said tax was not paid when due, although demands have been made of the Defendant for the same, it is delinquent, and

there is now due and owing to the Plaintiff, in addition to said tax and penalty:

(a) The sum of $347.59 representing interest on said tax at the rate of 6% per annum, accrued from the due date, January 15, 1953 to July 15, 1954, together with,

(b) interest on said taxes at the same rate from and after July 15, 1954, until paid.

VIII.

That the total sum now due and owing Plaintiff from Defendant is $7,882.93 together with interest at 6% per annum on the sum of $6,028.27 from and after July 15, 1954, until paid.

IX.

That all conditions precedent necessary to the commencement of this action and to the fixing of Defendant's liability for such taxes, interest and penalties, have been performed by Plaintiff or have occurred.

X.

That the Defendant, Grimes Packing Company, on or about April, 1954 transferred, sold and conveyed all of its right, title and interest in the vessel Reefer II to Defendant, Northern Reefer Company.

XI.

That said vessel, presently owned by the Defendant, Northern Reefer Company, is subject to a statutory tax lien since the same was used in the prosecution of the Defendant, Grimes Packing Company's business in Alaska.

XII.

That the Defendant, Grimes Packing Company is a defunct corporation not entitled to do business in Alaska and is without known assets to satisfy the tax obligation owing herein.

Second Claim

I.

Plaintiff re-alleges as though fully set forth herein paragraphs I, II and III of its first claim.

II.

That the Defendant, Northern Reefer Company is a foreign corporation not registered with or entitled to do business in Alaska, and failed to file the necessary certificates and statements required by law to be filed by foreign corporations.

III.

That said foreign corporation was engaged in the salmon processing and freezing business in Territorial waters for a period of 100 days from, on or about 22 May 1954 to date.

IV.

That as a result of engaging in business in Alaska without first registering with the Territory as a foreign corporation and filing such certificate and statement required by law, the said corporation is required to forfeit to the Territorial Treasury the sum of $25.00 per day for each day it shall so neglect to file the same.

Wherefore, Plaintiff prays that the court enter a decree against the Defendant, Northern Reefer Company as follows:

1. On its first claim: That it have judgment for $7,882.93 with interest on *$6,1028.27* at 6% per annum from 15 July 1954, until paid,

(a) Declaring that said sum of $7,882.93 with accrued interest is a first and specific lien against the vessel, Reefer II,

(b) Foreclosing said lien and ordering said vessel to be sold to satisfy the sum due.

2. On its second claim: That it have a personal judgment against the Defendant corporation, Northern Reefer Company for the sum of $2500.00 to be increased by $25.00 per day for each and every day after September 15, 1954 that the said Defendant, while doing business in the Territory, fails to file the necessary certificates and statements.

3. For a reasonable attorneys fee, costs of this action and such other relief as to the court may seem just.

Dated at Juneau, Alaska, this 15th day of September, 1954.

J. GERALD WILLIAMS,
Attorney General,
/s/ By EDWARD A. MERDES,
Assistant Attorney General

Affidavit of Service Attached.

[Endorsed]: Filed Sept. 15, 1954.

[Title of District Court and Cause No. 7143-A]

ANSWER TO AMENDED COMPLAINT AND AFFIRMATIVE DEFENSES

Come now defendants Northern Reefer Company and Reefer II (a vessel) and for answer to the complaint, state, allege and deny as follows:

I.

Answering Paragraph I of the complaint, admit the same.

II.

Answering Paragraph II, for the tax years in question namely 1952-1953, deny the same.

III.

Answering Paragraph III, defendants deny the same.

IV.

Answering Paragraph IV, defendants deny the same.

V.

Answering Paragraph V, defendants deny the same.

VI.

Answering Paragraph VI, defendants deny the same.

VII.

Answering Paragraph VII, defendants deny the same.

VIII.

Answering Paragraph VIII, defendants deny the same.

IX.

Answering Paragraph IX, defendants deny the same.

X.

Answering Paragraph X, defendants deny the same.

XI.

Answering Paragraph XI, defendants deny the same and particularly deny that said vessel is subject to a statutory tax lien in that the conditions precedent thereto have not been met.

XII.

Answering Paragraph XII, defendants deny the same in that Grimes Packing Company never was a corporation.

Answer To Second Claim

I.

Answering Paragraph I of the second claim, defendants restate their applicable allegations above set forth.

II.

Answering Paragraph II of the second claim, the defendant Northern Reefer Company admits it is a foreign corporation and further admits that it has not as yet qualified to do business in the Territory of Alaska.

III.

Answering Paragraph III of the second claim, the defendant Northern Reefer Company admits that for the period of approximately May 22nd,

1954 through July, 1954, it took 39,503 red salmon for which it paid the sum of 75c each and 2,774 king salmon for which it paid the sum of $2.60 each, all in the Bristol Bay area, but denies that it was doing business in the Territory of Alaska in the statutory sense requiring it first to qualify to do business as a foreign corporation.

IV.

Answering Paragraph IV of the second claim, these defendants state that the same is a conclusion of law, move that it be stricken and in the alternative and should it not be so stricken, deny the same.

First Affirmative Defense

I.

By way of further answer and as a first affirmative defense, defendants state that O. L. Grimes, doing business as Grimes Packing Company, died December 8, 1952; that his estate was probated in the Territory of Alaska as well as in the State of Washington and that no claim on behalf of the Territory of Alaska for taxes levied by Chapt. 97 S.L.A. 1949, as amended by Chapt. 116 S.L.A. 1951, as set forth in this complaint has ever been filed.

Second Affirmative Defense

I.

By way of further answer and as a second affirmative defense defendant Northern Reefer Company states that it does not now own nor has it ever owned the vessel Reefer II; and defendant Northern Reefer Company further states that it did not operate nor did it have any interest whatsoever in

the operation of the vessel Reefer II in any areas, including Alaskan waters, during the tax years 1952-1953.

Third Affirmative Defense

I.

By way of further answer and as a third affirmative defense, in the event and if for any reason any tax levied by Chapt. 97 S.L.A. 1949, as amended by Chapt. 116 S.L.A. 1951, be found due and owing by defendant Northern Reefer Company or be found to constitute a lien against the vessel Reefer II, these defendants urge and allege that said Chapt. 97 S.L.A. 1949, as amended by Chapt. 116 S.L.A. 1951 or any other legislation of the Territory of Alaska imposing or seeking to impose an annual license tax with respect to freezer ships and other floating cold storages equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shell fish or other fishing resource bought or otherwise obtained for processing through freezing is unconstitutional, unlawful, invalid and of no meaning or lawful force or effect whatsoever for the reason, among others, that it violates the "Equal Protection Clause", the "Due Process Clause", and the "Commerce Clause", of the Constitution of the United States of America and that it is violative of Sections 6 and 13 of the Organic Act of the Territory of Alaska, that it is discriminatory, and arbitrary and that it violates other acts and constitutional provisions and laws of the United States of America and of the Territory of Alaska which will be designated and described at the time of trial and.

of which this honorable court can and should take judicial notice.

Wherefore, having fully answered plaintiff's complaint on file herein, defendants Northern Reefer Company and the vessel Reefer II pray:

1. That plaintiff's complaint herein be dismissed with prejudice.

2. For their reasonable attorneys' fees and the costs of defending this action.

3. For such other and further relief as to this honorable court may appear meet and just.

/s/ JOHN H. DIMOND

Attorneys for Defendants, Northern Reefer Company and the vessel Reefer II.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 24, 1954.

[Title of District Court and Cause No. 7143-A]

STIPULATION

It is stipulated between the plaintiff, Territory of Alaska, and defendant, Northern Reefer Company, as follows:

1. If, by final judgment rendered by the above entitled court (and affirmed on appeal, if any) in any or all of the civil actions numbered 7129-A, 7130-A, 7131-A, 7132-A, 7093-A, 7142-A and 7143-A, which actions were consolidated for trial by minute order of the court entered on January 7, 1955, it is determined that the tax imposed in respect to freezer ships and floating cold storages by the provisions of

Chapter 97, SLA 1949 as amended by Chapter 116, SLA 1951, is valid; then, defendant, Northern Reefer Company, stipulates that the vessel, Reefer II, was used during the tax year 1952 by the Grimes Packing Company, or with its permission, in a business in connection with Alaska's commercial fisheries, consisting of the purchasing, freezing or otherwise obtaining of salmon caught in Alaska waters.

2. If, by final judgment rendered by the above entitled court (and affirmed on appeal, if any) it is determined that the Territorial tax lien, provided for by Section 4 of Chapter 97 SLA 1949, still attaches to the vessel, Reefer II, as a result of tax liability incurred by O.L. Grimes, despite the death of O. L. Grimes, the failure of the Territory to file any claim against his estate, and any subsequent sale or sales of the said vessel, which defenses may be raised by defendants herein; then defendant, Northern Reefer Company, agrees to pay to the Territory all taxes, penalties and interest found to be due by reason of the "business" and "final judgment", referred to in paragraph 1 of this stipulation.

3. The Territory waives and dismisses its Second Claim of its Amended Complaint in the above entitled action.

Dated February 10th, 1955.

J. GERALD WILLIAMS
Attorney General of Alaska

/s/ By EDWARD A. MERDES
Assistant Attorney General
Attorney for plaintiff
PEYSER, CARTANO, BOTZER & CHAPMAN
Attorneys for defendant, Northern Reefer Company

/s/ JOHN H. DIMOND
Of Counsel

[Endorsed]: Filed February 12, 1955.

[Title of District Court and Cause No. 7143-A]

AFFIDAVIT OF LULA NIXON

State of Washington
County of King—ss.

Lula Nixon, being first duly sworn upon oath deposes and says:

In the calendar year 1952 she was bookkeeper for Grimes Packing Company; the manager of Grimes Packing Company in that year was O. L. Grimes who died at Seattle, Washington, on December 7, 1952.

To the best of her knowledge the total catch of the Reefer II for the year 1952 consisted of the following:

Reds	43,141
Chums	11,987
Kings	21
Pinks	91

To the best of affiant's knowledge, these fish were canned by the Friday Harbor Canning Company at Friday Harbor, Washington. Your affiant has been unable to determine the number of cases packed from the catch of Reefer II.

The following is a summary of taxes paid by Grimes Packing Company during the year 1952 as shown by the books of the Company:

To A. A. Tremper, King County Treasurer:

Date	Item	Amount
2/18/52	Merchandise, Bell Street Terminal	$ 446.67
2/18/52	Real Property, 10720 Phinney Avenue, Seattle	69.36
2/18/52	Real Property, 1887 Shelby Street, Seattle	125.93
5/6/52	Vessel Alert	62.10
5/6/52	Unnamed small boats	56.92
5/6/52	Canned Salmon, Bell Street Terminal	394.24
5/6/52	Vessel Great Sitkan	362.84
To Territorial Tax Commission:		
6/23/52	Vessel Alert	50.00
	Vessel Reefer II	25.00
	Raw Fish Tax	1,375.61

To the best of affiant's knowledge and belief the taxes paid to the Territorial Tax Commission on the vessels Alert and Reefer II were license taxes. To the best of Affiant's knowledge and belief the

catch of Reefer II during the year 1952 was made outside of the three-mile limit.

/s/ LULA NIXON

Subscribed and Sworn to before me this 12th day of October, 1955.

[Seal] /s/ MAXINE W. MARSH

Notary Public in and for the State of Washington, residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed October 20, 1955.

[Title of District Court and Cause No. 7143-A]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the Territory of Alaska, plaintiff, the sum of Two Hundred Fifty Dollars ($250.00).

The condition of this bond is that, whereas the defendant has appealed to the Court of Appeals for the Ninth Circuit by Notice of Appeal filed on the 20th day of June, 1956, from the judgment of this Court entered on the 21st day of May, 1956, if the defendant shall pay all costs adjudged against it if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the defendant fails to perform

this condition, payment of the amount of this bond shall be due forthwith.

Dated and sealed this 20th day of June, 1956.

NORTHERN REEFER COMPANY
GRIMES PACKING COMPANY
/s/ By JOHN H. DIMOND
Principal

FIREMAN'S FUND INDEMNITY COMPANY
[Seal] /s/ By CLAUDE E. WAKEFIELD
Surety

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Cause No. 7143-A]

STIPULATION RE SUPERSEDEAS ON APPEAL

Whereas, the above named Grimes Packing Company has appealed to the United States Court of Appeals for the Ninth Circuit from the Judgment of the above entitled court, entered against the said Grimes Packing Company on May 25, 1956, in the sum of $4,062.46, plus interest; and

Whereas, the said Grimes Packing Company has deposited with the clerk of the above entitled court the Bank of California voucher No. 39509, dated June 29, 1956, in the sum of $4,339.38, payable to: "John H. Dimond, attorney for Grimes Packing

Company, Faulkner, Banfield & Boochever, P. O. Box 1121, Juneau, Alaska", which voucher has in turn been endorsed by the said John H. Dimond payable to the order of the Clerk of the District Court, First Judicial Division, Territory of Alaska;

Now, Therefore, it is stipulated between the undersigned as follows:

1. The said sum of $4,339.38 shall constitute a supersedeas bond for the said Grimes Packing Company, pursuant to the provisions of Rule 73 (d) Federal Rules of Civil Procedure.

2. The condition of said bond is as follows: If the said Grimes Packing Company shall prosecute to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if the appeal be dismissed, or if the judgment is affirmed, and satisfy any modification of the judgment and such costs, interest and damages as the Court of Appeals may adjudge and award, then the said sum of $4,339.38 shall be returned to the said John H. Dimond, attorney for Grimes Packing Company, upon his request; otherwise, the said sum, or such part thereof as may be necessary, may be disbursed by the Clerk of the Court to the Territory of Alaska, upon its request, in payment and satisfaction of the said judgment in full, together with costs, interest and damages for delay, if the appeal is dismissed or if the judgment is affirmed, and in satisfaction of any modification of the judgment and

such costs, interest and damages as the appellant court may adjudge and award.

Dated at Juneau, Alaska, this 2nd day of July, 1956.

FAULKNER, BANFIELD & BOOCHEVER

/s/ By JOHN H. DIMOND
Attorney for Grimes Packing Co.

J. GERALD WILLIAMS
Attorney General of Alaska

/s/ By HENRY J. CAMAROT
Attorney for Territory of Alaska

[Endorsed]: Filed July 2, 1956.

[Endorsed]: No. 15288. United States Court of Appeals for the Ninth Circuit. Northern Reefer Company, Grimes Packing Company and Reefer II, Appellants, vs. Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed: September 13, 1956.

Docketed: September 19, 1956.

/s/ PAUL P. O'BRIEN
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the District Court for the District of Alaska
Division Number One, at Juneau

Civil Actions: No. 7093-A, No. 7129-A, No. 7130-A, No. 7131-A, No. 7132-A, No. 7143-A.

TERRITORY OF ALASKA, Plaintiff,

vs.

ARCTIC MAID and ARCTIC MAID FISHERIES, INC.; PACIFIC REEFER and PACIFIC REEFER FISHERIES; PACIFIC QUEEN and PACIFIC QUEEN FISHERIES; ALASKA REEFER and ALASKA REEFER FISHERIES; NORTH STAR and NORTH STAR FISHERIES; and NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II (a vessel), Defendants.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 8th day of November, 1955, court having convened at 10:00 o'clock a.m., at Ketchikan, Alaska, the above-entitled causes came on for trial; the Honorable Walter H. Hodge, United States District Judge, presiding; the plaintiff appearing by Edward Merdes and Henry J. Camarot, Assistant Attorneys General; the defendants in causes Nos. 7093-A, 7129-A, 7130-A, 7131-A and 7132-A appearing by John H. Dimond, Byron Lane and Martin P. Detels, Jr., their attorneys; the

defendants in cause No. 7143-A appearing by John H. Dimond, their attorney; respective counsel having announced they were ready for trial, the following proceedings were had: [2]*

* * * * *

The Court: Very well then. The parties then are now ready to proceed?

Mr. Merdes: May it please the Court, I think the Court has the respective trial briefs of the parties, so I will be brief in the opening statement, and I presume the Court has had time to read them?

The Court: I have the trial brief on behalf of plaintiff.

Mr. Dimond: If the Court please, I am sorry I didn't get this filed here. The briefs have been served upon the plaintiff, your Honor, and I just neglected——

The Court: Very well.

Mr. Dimond: I would like to file two memorandums on behalf of the defendants, both of which have been served on the Attorney General.

Mr. Merdes: We have been served. [4]

Mr. Dimond: Excuse me, your Honor. I gave you the copy instead of the original.

The Court: Yes; I have it.

Mr. Merdes: May it please the Court, as the Court is aware, this is a consolidated action filed by the Territory against these seven defendants on the question of what we call freezer ship taxes under

---

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

the provisions of Chapter 97, S.L.A. 1949, as amended. Your Honor, the statute involved here, Chapter 97, levies a 1% tax against the value of the raw product, including salmon, value of the raw salmon, taken by land based cold storages, 1% of the value of their raw product which is subsequently sent on the fresh fish market. The same statute, Section (b), levies a tax of 4% on the raw product, of salmon in this case, caught by floating freezers. And the Territory—these defendants have failed to pay their taxes under the 4% provision—and the Territory filed suit for them, and in our complaint we simply allege that this is the statute, their failure to pay the taxes, the fact that they operated, and we ask judgment for the amount of taxes we contend is due.

The defendants in turn filed answers to our complaint and, among other things, they denied certain allegations of the complaint and set up certain affirmative defenses, which are enumerated in our trial brief and which very briefly are: that these fishing operations occurred at a point beyond the taxing jurisdiction of the Territory; and (2) that Chapter [5] 97 applied to the operations of these defendants violates their right to fish and take fish under the White Act; the third affirmative defense is that the imposition of the tax under Chapter 97 burdens and unjustly discriminates against them in interstate commerce; and (4) that the Chapter 97 tax, when it purports to levy a 1% tax on land based cold storages and a 4% tax on floating freezers, is an unjust, arbitrary, and illegal discrimination con-

trary to the various clauses in the Constitution; the fifth defense is that this tax which was levied on their operations is a confiscatory tax contrary to the Constitution and taken in deprivation of property without due process of law.

And, your Honor, a separate issue in this case is the Northern Reefer case which involves a transaction where the Grimes Packing Company came up to the Territory, fished in Territorial waters, it is admitted; they fished, didn't pay their taxes, which is admitted; they subsequently took off, and the vessel was still on this fishing, Reefer II, was subsequently purchased by one of these defendants, Northern Reefer; and there is a stipulation of facts filed on that point admitting all these facts I am relating to the Court, and the question in that case is whether or not the lien imposed by Territorial law, which is a certain provision of Chapter 82, incorporated in Chapter 97 by reference, which very briefly states that all property used in the prosecution of [6] the fisheries business with the consent of the owner is subject to a lien, and of course the theory of the Territory in this particular point is contending that this lien has followed this ship, even though the ship, admittedly, was purchased by the purchaser apparently without notice. Now, very briefly, your Honor, that is the case.

The Court: There is no provision in the act merely for the filing or recording of the lien?

Mr. Merdes: No provision at all requiring that that lien be recorded. We will state the law on it in

final argument, your Honor, but I don't want to go into that right now in the opening statement.

Finally, there are some counterclaims filed in the court by defendants Arctic Maid, Pacific Queen, Alaska Reefer and North Star. They contend, your Honor, that they paid certain taxes under protest. The Territory filed replies to these counterclaims denying the allegations and, therefore, putting them in issue. And very briefly, your Honor, that is what is involved in this case; and in substance the basic issue, as we see it, is whether or not the classification is a valid one, whether we can assess a 4% tax against them and a 1% tax against land based cold storages, and the other issues will dovetail into that one.

Now, with that in mind, your Honor, I would like at this time to introduce a stipulation that the parties have [7] entered into in order to make the cases more intelligible to the Court, because it is quite a complicated matter, these several cases, and I will state for the purposes of the record that counsel have been very cooperative and have worked hard to do this, and we hope in some way or other that it will ease the Court's burden somewhat in determining the issues of the case.

The Court: Thank you.

Mr. Dimond: If the Court please, as the Court will note, the stipulation, that has been introduced or agreed upon, is that certain facts will be presented to the Court and all of them are subject to objection on the grounds of relevaney. Now, does the Court wish to——

Mr. Merdes: No. I would rather not. Your Honor, I would rather not argue those points until they come up. I mean, everything, it is understood, is subject to objection as to relevancy at the appropriate time it comes up.

The Court: Then we just simply hear the opening statements at this time.

Mr. Merdes: That is right.

Mr. Dimond: I thought it was part of the plaintiff's case, your Honor.

The Court: No. It is purely an opening statement.

Mr. Merdes: That is all, your Honor. I introduced that into evidence, always understanding that it can be [8] objected to at any time and, furthermore, that additional evidence, your Honor, can be added to the stipulation to clarify matters. In other words, that is not a binding stipulation completely, because we so stated, that additional facts may be added as long as they are not utterly inconsistent.

Now, your Honor, under the allegations of the plaintiff's complaint—oh—one further thing, your Honor. In accordance with agreement between counsel it was agreed that the plaintiff's complaint would be amended to include the up-to-date tax liabilities in Exhibit 9 in this stipulation, to include the fact that the operations for these defendants, the tax liability, is spanned over the years from 1949 through 1954, and in effect an allegation that, if this act is valid, they are the taxes that are due and owing. In other words, the stipulation is in accordance with Stipulation No. 9. They may dispute

the interest and penalties, but the taxes themselves, your Honor, it is agreed will be due and owing in the event the statute is upheld.

Is that true, Mr. Dimond?

Mr. Dimond: We agree, your Honor, that the complaints may be considered as having been amended to reflect the taxes—taxes, penalties and interest—which the Territory claims to be due as reflected in Exhibit No. 9 of the stipulation just now presented to the Court. That is all.

The Court: Very well. Such amendment then may be [9] allowed as shown in Exhibit No. 9.

Mr. Merdes: Well, your Honor, I want to make it clear right now. I want to avoid reading Mr. Parke's testimony as to what each company owes and so forth just to prove the amount of taxes. That is what I want to avoid. I can do that right now. But if they will agree that in the event the statute is upheld that those are the taxes that they do owe, that will save me from having to prove that they owe these taxes.

The Court: Well, supposing the stipulation be limited to this, that these are the amount of taxes that are found due by the Tax Commissioner.

Mr. Merdes: In other words, what I want to get around, your Honor, is having to read something from an official of the Department of Taxation to prove that these taxes are due.

Mr. Dimond: We agree that those are the taxes that will be due if the tax is valid. That I think we can agree upon, your Honor. We may have some defense on the amount of penalty.

Mr. Merdes: That is right. I admitted that.

Mr. Dimond: We don't stipulate as to the penalty.

Mr. Merdes: In other words, I don't have to prove the taxes due if the act is valid.

The Court: Are these taxes based upon returns made [10] by these defendants?

Mr. Merdes: That is right, your Honor. They are not only returns; they are numerous, numerous facts and figures we finally arrived at, only we never — only that the returns were based upon a stipulation of the cost of fishing they submitted.

The Court: The returns are not necessarily binding, it is your position, upon the Commissioner?

Mr. Merdes: That is right, your Honor.

Mr. Dimond: If the Court please, there is only one other thing. It is just conceivable, we think, that the Court could hold that fish taken aboard freezer ships while the freezer ships were lying outside the three-mile limit are not taxable. If that is true and the only fish that are taxable are those which are taken aboard while inside the three-mile limit, then of course the Territory will agree the amount of taxes would have to be adjusted accordingly?

Mr. Merdes: Of course, your Honor, the whole thing is subject to the validity of the act. I mean, if the Court would find they are not taxable when taken beyond the three-mile limit, then, obviously, we can't collect. I mean, that is implied as part of the decision.

The Court: May I interrupt though just a minute? Has any effort been made or it is possible, physically possible, to make any division, that is, to determine the [11] amount of fish that are taken inside and outside? I presume that there is no way that that can be done.

Mr. Merdes: We will show that, your Honor. I mean, we will submit the interrogatories, and they can show it, but of course they will contend, I think, that merely because the mother ship itself was sitting out there, that regardless of where the fish were caught, that that is not taxable, but that is a matter of argument. Now, your Honor——

The Court: Your position, counsel, as shown in your brief, is that the amount that were taken outside are negligible?

Mr. Merdes: Very, very definitely. There is no proof of the amount.

The Court: We will probably hear from counsel for defendant on that point too.

Mr. Merdes: Your Honor, there are just a few points I would like to make. I particularly want to refer to Exhibit 2, which of course is the facts upon which the taxes is based, and Exhibit No. 4, which shows that they actually operated in Alaskan waters north of Dixon Entrance, and Exhibit No. 9, which states — which shows, your Honor, that the total taxes and penalties and interest due from all these defendants, which defendants certainly don't constitute the entire freezer pack, amounts to $116,730.21. And, your Honor, at this time, since the defendant has alleged certain affirmative defenses [12] and

since there is a presumption of constitutionality and validity of our taxing statutes, the Territory rests.

The Court: Oh, I beg your pardon. I thought you were merely making an opening statement.

Mr. Merdes: No, your Honor. We rest on the basis of the stipulation, and they can object of course to relevancy. In other words, our position is that all the allegations of our complaint have been proven by the stipulation entered into evidence, in other words, the amount of taxes due and everything and so forth. In other words, it is not necessary to put anybody on the stand. If the Court will check the allegations of the complaint, it will see that every one of the allegations——

The Court: There are in the file, it appears, numerous interrogatories. You do not propose—those are for discovery only?

Mr. Merdes: No, your Honor. In the event that, when they are carrying the burden of proof, it is necessary in rebuttal to show that the classification is justified, we will proceed, but we take the position that is taken by the Supreme Court, that this act is presumably valid.

The Court: Yes. Well, what I mean to inquire is—there are no depositions either——

Mr. Merdes: Oh, we may very well need the depositions if they put evidence on on their affirmative defenses. [13]

The Court: You wish to reserve those then for rebuttal?

Mr. Merdes: Oh, yes; everything in rebuttal, your Honor.

Mr. Dimond: If the Court please, I would like first in behalf of the defendants to object on the grounds of relevancy to certain exhibits contained in the stipulation which the Territory has introduced.

The first exhibit, if the Court please, is Exhibit No. 12, which purports to show the expenses over and above routine office expenses that the Territorial Government has made in the enforcement and collection of the tax claimed to be due from these defendants, or from these defendants and other floating freezer ships and cold storages. We object to the inclusion of any of that material. In other words, we think that none of Exhibit No. 12 is relevant.

The reason for this objection is that in 1949 the Legislature passed Chapter 97 imposing a 1% tax on the business of processing fish through freezing, and, presumably, that 1% tax in 1949 and 1950 applied as well to floating cold storages as it did to land based cold storages. It was not until 1951 that the Legislature in the early part of 1951 amended the act and raised the tax on floating cold storages 400%. They made the tax 4% on floating cold storages and left it at 1% on land based. [14]

Now, the considerations which the Legislature, the factors which the Legislature might have taken into consideration at that time might well have included the additional cost of enforcement and the burden and inconvenience in collecting the tax from the floating freezer ships, that is, to justify the attempted discrimination against them, but anything

that happened subsequent to the passage of the act could have no conceivable bearing upon what the Legislature might have considered when debating and considering this act in 1951.

I think the cases on classifications are probably replete with statements such as this, that the Legislature can recognize evils and determine classifications and the Legislature is the sole judge as to whether one person should be taxed higher than another. That was quite true. But these additional costs of enforcement, particularly those relating to the suit in progress now, were not before the Legislature in 1951 at all and, therefore, could have no relevancy and no bearing on any possible basis for taxing the freezer ships four times the amount that the floating cold storages are taxed.

Shall I take up these different separate issues, or give the Territory a chance to answer each one?

The Court: Well, counsel, anticipating this same objection after reading the trial brief presented by the plaintiff, it is the Court's opinion that there is an issue raised here with regard to these expenses or costs of collection. [15] I do not propose to decide it at this time, but it does appear material upon that issue. If it be determined that the cost of collection is not the proper item to be considered in classification of license taxes, then of course this exhibit will not be considered; but, if it be determined that such costs are a proper factor in determining classification, then the exhibit would be material; so, by reason of the fact that that issue is before the Court, the objections to Exhibit 12 will

be overruled without deciding, however, finally as to whether or not the Court in the final analysis is entitled to consider those expenses. We hold them at the present at least to appear material.

Mr. Dimond: If the Court please, would that ruling of the Court also go to the 1954 and 1955 expenditures made by the Attorney General's Office in connection with this suit?

The Court: Oh, surely not. I had not noticed that. In connection with this suit?

Mr. Dimond: The lower half of Exhibit No. 12 says: "Separate extraordinary expenditures"——

The Court: Oh, yes. "Separate extraordinary expenditures made by the Department of Taxation and Attorney General's Office in connection with bringing suit and obtaining service of process for collection of the tax"—No.

Mr. Dimond: We think that is irrelevant, your Honor.

The Court: How could that be material? [16]

Mr. Merdes: Well, your Honor, it could be material to this extent. If you say that the cost of collection is just normally pertaining to going out and running them down, and trying to collect the taxes from them is a cost of collection, certainly, if they paid their taxes at a time to the Territory subsequent, as a matter of principle, they spend time going out and trying to get them—what is the difference if the Attorney General goes out and tries to get evidence in, just like the Department of Taxation or the Attorney General, through their failure, willful failure, to pay taxes, has to spend hours of

labor to try and collect it. Certainly it is a factor in principle the same as it is to go out and collect the interest.

The Court: Counsel, if this factor or item be considered at all, it must be considered as relating back to the time of the passage of the act itself by the Legislature. Surely, you could not claim that the Legislature contemplated that the Attorney General or the Department of Taxation would be required to bring suit to collect these taxes.

Mr. Merdes: Well, your Honor, our answer to that would be this, that the Legislature could absolutely foresee the difficulties involved. They may not have occurred at the time, but they could foresee, for example, based on experience they have had, that they knew they would have difficulty, for example, the first step would be the cost of enforcement and [17] collection of these things, would be the actual investigation, the actual going out and trying to get the taxes, and the forms, and the office expense, and so forth. They can anticipate that these people, because they own no property up here and they come up and go, that they would necessarily cost the Territory money. Incidentally, they appropriated money for us; public tax money was appropriated for us just like tax money is appropriated for the tax enforcement officer to go out and try to collect them.

The Court: Well, the Court cannot conceive how the Legislature in classifying businesses for the purpose of taxation would consider the cost of bringing suit to test out the validity or to collect

these taxes. That, certainly, would not be a proper measure in the first instance in enacting the legislation, and that is the issue here, as I understand it.

Mr. Merdes: Well, your Honor——

The Court: I am sure I cannot see where the Court would consider it material, this second section of your Exhibit 12.

Mr. Merdes: Well, of course, your Honor, when you say policing and collection, it is an integrated process. It just isn't one that is policing and prosecution. It is also an expense.

The Court: Suits to enforce taxes are extraordinary [18] remedies. You can consider what the Legislature may probably have had in mind in the difficulties of enforcement and collection of the tax against drifting, floating equipment. That is the only issue which I think the Court can consider.

Mr. Merdes: Well, of course, your Honor, we——

The Court: No; I am sorry, counsel; I cannot consider this at all as material.

Mr. Merdes: Well, all right, but we would like to make an offer of proof on it for the purpose of the record.

The Court: The offer is denied, and the objection of the defendant to the second portion of Exhibit 12 then, as being immaterial, is sustained.

Mr. Merdes: Yes, your Honor. I just want to make the offer clear, that the——

The Court: I think you have done so, counsel.

Mr. Merdes: All right.

Mr. Dimond: If the Court please, I also wish to

object to Section (b) of Exhibit No. 13. I think the Court's ruling, overruling our objections to most of Exhibit 12, cover this also with the exception of 1954. The Court will note under (b) in 1954 it shows that it cost $5.37 for each dollar collected from floating freezer ships. I think, your Honor——

The Court: Pardon. Your Exhibit 14?

Mr. Dimond: Exhibit No. 13.

The Court: Oh, 13. [19]

Mr. Dimond: "General ratio of"—unless I have the wrong number.

Mr. Merdes: 13 is right.

The Court: And which subdivision here?

Mr. Dimond: It is subsection (b). "General ratio of administrative expense"——

The Court: Oh, yes; I find it.

Mr. Dimond: For 1951, 1952 and 1953 I wish to again state my objection on the ground that for the reason stated, for our objections to Exhibit No. 12—the Court's ruling will probably take care of that—but for 1954 the figure of $5.37 for each dollar collected must, I think, and perhaps the Attorney General can help me on this, include the expenses of bringing suit as a factor there. If that is true, then the 1954 figure shouldn't be allowed under the Court's ruling.

Mr. Merdes: As a matter of fact, your Honor, these figures were prepared by the Department of Taxation, and, unless the defendants can submit some evidence to show that that is based on that, I really don't know. I presume that it was based upon the general administrative expenses, which it states.

It doesn't say anything about extraordinary; and, if defendants can introduce some evidence to show that that isn't so, then we will agree to it; otherwise, we won't.

The Court: Well, the Court would like to hear some evidence on that. This is prepared by—— [20]

Mr. Merdes: Both parties.

The Court: The figures were submitted by——

Mr. Merdes: Mr. Parke.

The Court: Mr. Parke. Well, we should like to hear from him on that. We will reserve decision then on the 1954 item of Exhibit 13 (b).

Mr. Merdes: Well, Mr. Parke isn't here, your Honor. The defendants had an opportunity to elicit that information, when we took his deposition, on cross examination. That was one of the subjects of cross examination. The bare statement of fact there shows it is administrative expenses of enforcement and does not include, as far as I know, the extraordinary expenses connected with bringing the suit.

The Court: Well, we said we would reserve decision on that, at least until——

Mr. Dimond: I think this can be shown from Exhibit No. 12. If the Court will turn back to Exhibit No. 12, for 1954, the top half of the exhibit, it shows the total expenditures were $553.11. Now, if you turn back to Exhibit 13, it shows the total taxes collected were $849.05. Now, certainly, $5.37 per dollar isn't the ratio between those two figures. It must include other expenses. The Territory shows in Exhibit 12 that it costs the Territory $963.00 to collect $849.00 in the same year. That can't be a

ratio of $5.37 per dollar. It must include those additional suit expenditures. [21]

The Court: It does include what now?

Mr. Merdes: Well, your Honor, of course, there is another item. You know, it says "over and above routine office expenses," which are, I think, 3.3c on each dollar. I wish the Court would take that into consideration. These are extraordinary. The normal cost of collection of a dollar of tax is 3.3c. These are over and above all that. They have got to include that figure in, and the statement right there on its face, unless there is contrary evidence, is what it costs; only I would like for them to prove it.

The Court: Well, gentlemen, we will dispose of this objection in this manner. The objection to Exhibit 13 (b), with reference to the ratio of administrative expenses reported in 1951, 1952 and 1953, on the grounds of materiality, for the reasons assigned as to Exhibit 12, will be overruled. As to the figure in 1954, the Court will consider the ratio as here given only to the extent that it is disclosed by the record or other evidence that such figure does not include the costs of bringing suit, which are shown in the second section of Exhibit 12. If it be found that such ratio does include those expenditures, the item as to 1954 will be excluded, because the Court thinks it is not material.

Mr. Merdes: Well, in any event, your Honor, the entire item would not be excluded, because, certainly, it would be at least the same as '53 and possibly more based on [22] the——

The Court: It will be considered for what it is worth.

Mr. Merdes: Yes; that is right; and, may it please the Court, of course, I am going to except too to the Court's ruling on excluding the costs of prosecution.

The Court: No exceptions are necessary any longer under the Federal Rules.

Mr. Merdes: I understand that.

Mr. Dimond: Now, if the Court please, we come to Exhibit No. 14, which says "Receipts from Land-Based Cold Storages and other Fish Processors derived by the Territory from taxes other than those imposed by the Act". The defendants wish to object to all of that exhibit with the exception of the last item, "Raw Fish Taxes Paid by Land-Based Canneries Under Chapter 82".

The reasons for the objection are that we consider that taxes that cold storages and canneries might have paid the Territory by way of corporation income taxes and that the Territory claims to be due under the Territorial property tax act, and we don't know if they can collect it or not, and the estimated tax paid to the incorporated cities are not relevant for the purpose of this dispute. Now, I think I can explain to the Court why that is.

The Territory admits in its brief, and I think it is [23] clear from the statute, that this tax of 4% on freezer ships applies to resident freezer ship owners as well as the non-resident freezer ship owners. In other words, they are taxed alike. Now, presumably, a resident freezer ship owner, a person

who lives in Alaska, resides here, pays his Alaska taxes, had a ship tied up in Alaska during the winter, would pay the same taxes that the land-based canneries and cold storages would pay. He would pay partnership or corporation or individual income tax. He would pay city taxes and Territorial property taxes. Consequently, when the Legislature proposed a 4% tax on freezer ships, both resident and non-resident alike, and only 1% on land-based cold storages, the Legislature could not have used as a basis of discrimination the fact that land-based cold storages pay taxes that the freezer ships didn't pay. It could not have been something considered by the Legislature, because the resident freezer ship owners would have paid the same taxes. It, therefore, could not have been a basis for the heavier burden placed upon freezer ships.

I don't see how the Legislature could possibly—we are talking about classifications here. What basis is there for imposing a 4% tax on one party and a 1% tax on the other? Certain factors can be considered by the Legislature. I don't see how in all reason the Legislature could have considered the fact that local taxes were paid by land-based cold [24] storages when a resident freezer ship would have paid the same taxes. As a matter of fact, these are all nonresidents in this case, but there is no reason why there couldn't be a resident freezer ship owner who would have paid the same taxes as the land-based cold storages. For that reason I think that evidence as to other taxes, outside of the li-

cense taxes on fish itself, are not relevant in this action.

The Court: Well, again, counsel, they may or they may not, depending upon determination of the real issues in this case, as I now view it, on this whole question of classification except as to Territorial property tax. Now, the tax here in question was levied at the same session of the Legislature as that which repealed the Territorial property tax, so, certainly, the Legislature could not have in mind that thereafter the land-based cold storages would be subject to Territorial property tax.

Mr. Merdes: Well, I think Mr. Dimond will agree that the cold storages is what they are referring to, the 10-mill property tax to the city.

The Court: Well, no; that is the next item, "Estimated Taxes Paid To Incorporated Cities". I am speaking of the item of "Territorial Property Tax" —oh—"Estimated amount to be collected as a result of favorable court decision on validity of property tax". Well, that is getting rather conjectural there, I fear. [25]

Mr. Merdes: Well, your Honor, now I just want to raise one point. Even if they are resident freezer ships, if they don't own any property, they may tie up at a port; and, furthermore, anything that the Legislature—anything they can take into consideration—they can consider the fact that they are developing the Territory and so forth, and, certainly, part of the development of the Territory is the payment of local taxes.

The Court: Counsel, here is the proposition.

Even though it be contemplated that some of the delinquent taxes of the Territorial property tax may be later collected following a favorable decision of the Circuit Court of Appeals, certainly it cannot be suggested that thereafter any of these land-based cold storages would be subject to the property tax to compare with the tax obligations which would proportionately have to be borne by the land-based cold storages and the freezer ships. No; I cannot see that.

Mr. Merdes: Well, you are right, your Honor. Remember, however, that was repealed in '53, your Honor, and all the taxes that would be due up to '53 would be a factor. Isn't that true? It was subsequently abandoned.

The Court: Oh, yes.

Mr. Merdes: Isn't that true? That wasn't repealed in 1949, your Honor.

The Court: I see; yes. [26]

Mr. Merdes: Yes.

The Court: I see.

Mr. Dimond: The 4% was passed in 1951, your Honor.

The Court: My premise there was in error in that the tax in the '49 Legislature was still in effect.

Mr. Merdes: That is right.

The Court: Well, again, counsel, I do not know at this time whether the comparative tax burden between these two classes of businesses may be proper for the Court to consider in determining whether there is discrimination here. Again, there is an issue before the Court on that very point, and

this Exhibit 14 is material to that issue, for which reason the objection will be overruled. That, again, however, is without finally deciding whether these comparative receipts or comparative taxes paid by other fish processors is a proper, is or is not a proper factor in determining the classification, so we will simply hold that it is material to the issue.

Mr. Dimond: If the Court please, we finally come to the last exhibit, No. 15, which consists of two pages, showing the appropriations made and the division of the appropriations for the Alaska Department of Fisheries, which the Territory maintains, I believe, are expenses made by the Territory, as counsel mentioned, in the propagation of salmon. Now, defendants submit that this is absolutely irrelevant and should not be considered at all by the Court. The principal [27] reason is we consider that the act of the Territorial Legislature in creating the Department of Fisheries and in subsequently appropriating many millions of dollars, hundreds of thousands of dollars, to carry out the purpose of the act, were ultra vires or illegal and invalid proceedings of the Legislature and, therefore, void.

A separate memorandum in addition to the memorandum on the trial itself which has been submitted to the Court on that question, as to whether or not—I think it is called "Memorandum On Admissibility Of Evidence"—that takes up the question of Chapter 68, S.L.A. '49, which created the Department of Fisheries, and we contend, based upon the argument contained in that memorandum and on

the authorities cited; that Chapter 68 would be an invalid act of the Legislature, that any appropriations made thereunder for the purpose of those acts would be invalid, and, therefore, if those things are invalid and illegal, they cannot be considered as a basis for justifying the Territory's classification or discrimination against freezer ship operation. That is one reason that we—I didn't want to go into the argument on this now, unless the Court wishes to hear it. We will reserve that portion.

The Court: I am not quite clear as to just what relation the expense of the maintaining of the Alaska Department of Fisheries may be as to this classification matter.

Mr. Dimond: Well, I am not sure either. [28]

Mr. Merdes: I will tell you.

The Court: Well, will you suggest, Mr. Merdes, how such exhibit may be material?

Mr. Merdes: Yes. First of all, your Honor, it was in response to a direct interrogatory by the defendant asking the Territory what the Territory spent for the conservation of salmon, because in Toomer v. Witsell, if the Court will remember from the trial brief, it expressly held in 334 U. S. at 398 that conservation measures may be considered in determining whether or not you are going to levy a higher tax against people who pay for them against people who don't pay for them, so, based on that premise and in direct response to their own interrogatories, they fully realized the rule in the Anderson-Mullaney case, your Honor, because the Supreme Court defeated the '55 license tax,

threw it out, for, among other reasons, the trial court refused to give the defendant money spent on conservation and enforcement, and so, fully realizing that and in direct answer to their own interrogatories, they realizing that rule, we gave this answer.

Now, if the Toomer case permits conservation expenditures to justify discrimination and we show that we spend millions of dollars of Territorial money for conservation of fisheries, then this is certainly relevant because it contributes—it shows what was spent. What local taxpayers paid for it has built up the fisheries which outsiders come in and take [29] and don't pay taxes for.

The Court: Well, but how would that be material in showing the justification of a 1% tax on this class and a 4% tax on the other?

Mr. Merdes: All right, your Honor. The taxpayer that pays the 1% contributes to this, pays all their taxes. That is land-based. What do these other parties do? They don't pay their taxes, and we are charging them more money, your Honor, 4%, because we are trying to get them to pay their fair share of the tax burden and to support the conservation of the fisheries, but, I mean, that is neither here nor there, your Honor; I mean, will the Court agree to the proposition that conservation expenditures are a factor which are paid for—although I think the Court is bound by the Toomer-Witsell case, I believe.

The Court: What page is that on?

Mr. Merdes: It is at 398.

The Court: It is in your brief.

Mr. Merdes: I will read it to your Honor.

"In this connection appellees mention, without further elucidation, the fishing methods used by non-residents, the size of their boats, and the allegedly greater cost of enforcing the laws against them. One statement in the appellees' brief might also be construed to mean that the State's conservation program for shrimp requires expenditure [30] of funds beyond those collected in license fees—funds to which residents and not non-residents contribute. Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation. But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion."

The point being that they can be considered as a factor, and it was so held, and Justice Frankfurter in Mullaney v. Anderson intimated the same thing, and, furthermore, your Honor, it goes on, the Supreme Court.

"The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for

any conservation expenditures from taxes which only residents pay."

Mr. Dimond: If the Court please, I would like to refer to that last quote of the Supreme Court and emphasize what the Court said, that they could charge a "differential which would merely compensate the State for any"—and I leave out the enforcement burden—"for any conservation expenditures [31] from taxes which only residents pay." Well, "merely compensate" merely means just what it says, and I don't think there has been anything on behalf of the Territory to show this four times the tax paid on land-based cold storages merely compensates the State for conservation expenditures from taxes which only residents pay.

If the Court please, there is no special tax in the Territory of Alaska which goes into the appropriation for the Alaska Department of Fisheries. That comes from the General Fund and general taxes all over, which includes, certainly, the tax paid on the 1% basis or the 4% basis by these cold storage operators, so it is not proved and cannot be proved that only residents pay the taxes which go into the appropriations of the Legislature for the Department of Fisheries.

And, secondly, and more important, your Honor, this case dealt with the state which has police power and control to regulate the fishery resources, and our courts have said time and time again and very explicitly that the Territory of Alaska has no power whatsoever to regulate its fisheries, as long ago as the Auk Bay salmon case in 1924. The Legislature

attempted to pass an act to regulate fisheries, to close seasons, and to regulate the type of gear, and the court said, "You can't do that. The Organic Act under Section 13 prohibits that explicitly." Judge Folta said the same thing again in the P. E. Harris v. Mullaney case, and then the Court of [32] Appeals in the Anderson v. Mullaney case, involving the non-resident fishermen's tax, again made reference to the fact that the Territory has no power to regulate. We submit that that lack of power to regulate means lack of power to spend money to conserve and propagate fish.

If you examine the powers granted to the Department of Fisheries in this Chapter 68 of the '49 Session Laws, you will see that the Legislature gave to the board some of the precise powers to regulate fisheries which were held invalid in the Auk Bay salmon case back in 1924, so, therefore—for two reasons—one, the Territory cannot police its own fisheries or regulate it—therefore, the statement by the Supreme Court cannot have any application here and——

The Court: Well, counsel, I think that the real point is not the matter of police regulation but the matter of conservation. It is that expense of conservation in which I think the Territory has power.

Mr. Dimond: Well, I submit, your Honor, that this memorandum on the subject will explain our position that conservation is——

The Court: You see, I have not had the advantage of your memorandum, counsel, having had no chance, of course to read it. It was handed to me

this morning. I think it will be necessary for the Court to reserve decision upon this important point, and we will decide it in connection with the [33] determination of the general issues. In a case of this character of course, a trial by the Court without a jury, questions of materiality need not be immediately ruled upon, because, if they are not material, the Court will not consider them in arriving at a decision in the matter. If they are material, they will be considered. Therefore, I will simply reserve decision as to Exhibit 15 because I am at a loss just now to know what determination should be made on the objection.

* * * * *

Mr. Dimond: Yesterday the Attorney General and counsel for defendants agreed upon a further stipulation of facts, that is, that we can introduce certain facts subject to objections that the Attorney General might have on the grounds of relevancy, and that is contained in a stipulation which is dated November 7, 1955, and contains two exhibits. One pertains to the number of fish purchased or otherwise obtained by each defendant for the years '49 through '54, and the other one shows the comparative pack of salmon throughout the years '49 through '54 of shore canneries, floating canneries and freezers. And at this time I would like to offer in evidence that stipulation.

Mr. Merdes: I will reserve any objections to it later, your Honor, which is the point of these discussions that we have had.

The Court: Very well.

Mr. Merdes: And also, may it please the Court, I would, in order to have an orderly trial here, I would also like to object to certain of their stipulations in the basic stipulation, but I wouldn't want to go through the same procedure we did before. Why don't I just tell the Court which ones I object to, and then maybe you can consider it in argument or on briefs, just like Mr. Dimond took certain exhibits and objected to them; well, I also would like to object to [35] certain ones.

The Court: We are a little bit out of order here possibly, but it is not too important. What we had in mind at this time was merely an opening statement on behalf of counsel, but we are getting into the offering of exhibits, which is a matter of testimony, but, yet, the plaintiff has already rested, so there is no objection to receiving the stipulation at this time. I will hear then from the Attorney General as to objections to these exhibits.

Mr. Merdes: All right. I object to Exhibit—to Appendix 2 to Exhibit 1.

The Court: I do not find Exhibit 1, not in this that was just now handed to me. You are referring back to the other?

Mr. Merdes: The old stipulation, the basic exhibit.

The Court: Oh; beg pardon. I thought you were referring to that which was just now offered. May we take up one thing at a time? Do you have any objections to the stipulation just now offered by counsel for the defendants?

Mr. Merdes: I cannot see the relevancy of the

number of operating units and comparative pack. That is Exhibit No. 17. That is the one that Mr. Dimond just gave you.

The Court: Well, surely, under the issues of the trial brief as you submit them, there is an issue here in determining the matter of discrimination.

Mr. Merdes: I presume the Court——

The Court: As between shore canneries and floating canneries. I think that that is material.

Mr. Merdes: May it please the Court, in regard to—that is all the objections we have to that exhibit. Your Honor, now, at some time——

The Court: We will hear then, as long as the—I understood that you had offered the original stipulation.

Mr. Merdes: It was just a matter of either one of us could have offered it, your Honor. It was just a matter of convenience that I offered it.

The Court: Do you wish to likewise urge some objection——

Mr. Merdes: On relevancy, to the main exhibit that the Territory introduced, Appendix 2 to Exhibit 1. Now, that purports to state the number of fish obtained by the defendants from freezing during those operations in which defendants' vessels—now, they mean mother vessels, the vessels that did not actually fish themselves—wait a minute——

The Court: I understand from your trial brief it is immaterial as to where the freezer ship vessels——

Mr. Merdes: That is right—where fish were caught——

The Court: ——were anchored, but the question is as to where the fish were caught. Again, I am inclined to believe that that is true. [37]

Mr. Merdes: Well, the only reason—this will merely supplement—in other words, the statement of fish caught is in another exhibit. This was apparently offered by the defendants to show that in the event the act is invalid in so far as it purports to tax fish on the freezer beyond the three-mile limit, so, if it is—I only object to it, the objection on the ground of the theory the Court mentioned, and you can take it for what it is worth; I mean, I have no serious objection to it.

The Court: Well, again, that is an issue which we will have to determine along with the general issues, and for the present at least the objection to this exhibit will be overruled but, again, without deciding finally whether it may be considered by the Court or whether it may not. We simply hold it is material to that issue.

Mr. Merdes: May I refer to Exhibit No. 8, a statement of taxes paid by each defendant to taxing jurisdictions other than Alaska? That at first blush may seem relevant, your Honor, on the ground of the confiscatory affirmative defense, and, however, we contend that the evidence will show and it is absolutely irrelevant based upon the arbitrary classification arguments, and that we object to that Exhibit 8 on the ground that it has no relevancy concerning the reason for the legislative classification of these defendants.

The Court: Well, it strikes me that, if we are

to [38] consider the relative tax burden in the Territory between the land-based operators and the freezer ship operators, that in justice we should likewise consider the tax burden on the defendants in the State of Washington. If one is relevant, surely the other is relevant.

Mr. Merdes: Well, of course we will develop that later, but, certainly, it is our position, it has no relevancy whatsoever in determining whether the Legislature can classify these people and may have some relevancy on whether or not the tax is confiscatory, as to whether or not it increases their profit and loss to such an extent that it is taking the property. We just want to make that statement for the record. I think it will be developed later in final arguments and briefs.

The Court: Here is the point as I see it, that, if it be determined that the Legislature has the right in making this classification to consider that these freezer ships do not carry any tax burden in the Territory with the land-based cold storages or canneries, then they likewise should consider what tax burden the non-resident freezer ships have elsewhere, if possible. Again, that is an issue which we will have to determine, but for the present the objections to Exhibit 8 then will likewise be overruled.

Mr. Merdes: At this time, your Honor, I would like to read a statement of fact into the record.

The Court: Well, beg pardon. I permitted you an [39] interruption here of Mr. Dimond's statement—I understood you had rested—in order to

consider your objections to the exhibits which he had interposed.

Mr. Merdes: Well, this is an exhibit that there was some original discussion on and——

The Court: Well, I think we should permit counsel for defendant to continue here.

Mr. Merdes: O.K. That is all right.

Mr. Dimond: If the Court please, I would like out of turn to refer to one particular case in this controversy, that is, the Territory of Alaska v. the Northern Reefer Company, Grimes Packing Company, and Reefer II, Civil Action No. 7143-A. In February of 1955 the Territory and the defendant Northern Reefer Company entered into a stipulation which appears in the court records to the effect that, if it is determined by the Court that the tax imposed with respect to freezer ships is valid, then we stipulate that the vessel Reefer II was used in Alaska waters in the prosecution of the business in connection with Alaska's commercial fisheries, that is, taking and freezing salmon, and then we also stipulated that, if by final judgment of this Court it is determined that the territorial tax lien, which Mr. Merdes referred to in his opening statement, still attaches to that vessel despite three things—the death of Grimes, the failure of the Territory to file claim against his estate, and the subsequent transfer of the vessel [40] from Grimes to the Northern Reefer Company—that is a matter of argument of course—if all those things are taken care of and the lien still attaches to the vessel, the Northern Reefer Company agrees to pay the taxes

which have been found to be due from the Grimes Packing Company as shown in Exhibit No. 9.

The Court: What is the point that you——

Mr. Dimond: Well, there is a stipulation that we just entered into with relation to those facts which I would like to introduce into evidence in this case. For example, it is stipulated——

The Court: I would not offhand consider it material at all, counsel, as to whether or not the Territory had filed a claim against the Grimes estate. If they have a lien, they have a lien. What difference would it make?

Mr. Dimond: We contend, your Honor, on authorities—they are rather meager, but we have some, and we are prepared to argue that at the conclusion of this case, that the failure of the Territory to file a claim against the estate, in the face of this particular lien statute, amounted to the Territory losing its lien on the vessel, and, secondly, that the failure of the Territory to enforce its lien before the vessel was transferred from the estate to a subsequent purchaser would also foreclose the Territory.

The Court: The theory of laches? Under the same theory as liens in admiralty? [41]

Mr. Dimond: It would be the same theory, your Honor. I would like to submit the stipulation. The Territory has signed it.

Mr. Merdes: We have no objection to it at all.

The Court: Very well.

Mr. Dimond: Well, I offer then the stipulation dated November 8, 1955, in the case of the Territory

of Alaska v. Northern Reefer Company, in evidence.

Mr. Merdes: I just want to advise the Court we don't purport that this is a maritime lien, and the stipulation also states that the Territory had no notice whatsoever.

The Court: Well, I was merely referring to the maritime lien for comparison is all, counsel.

Mr. Merdes: I see.

The Court: Because I think it is the law in admiralty that there is a waiver or laches if the lien is not enforced, for instance, before the vessel was permitted to go from one port to another and thereby incur further liens there for repair.

Mr. Merdes: That is usually a priority. There is no priority argument in this case.

The Court: That is true. I mentioned it merely by way of comparison. The stipulation then may be admitted. I think, likewise, we did not make a ruling on the stipulation presented by the defendants. That, likewise, may be admitted. [42]

For the purpose of the record I wonder if we had better number these somehow, Mr. Clerk?

Clerk of Court: Does the Court wish to mark them as stipulations; the one that is plaintiff's, call that No. 1; and the one that is Mr. Dimond's, call it A?

The Court: A stipulation is not exactly an exhibit.

Clerk of Court: No; but we could just designate them that way; or just plaintiff's stipulation and defendants' stipulation. However the Court wishes them marked, I will mark them.

The Court: Yes; that would be sufficient. Simply mark the——

Clerk of Court: Plaintiff's——

The Court: ——the first one presented as the Plaintiff's Stipulation and the second one as the Defendants' Stipulations and—well, we have two stipulations for the defendant. Mark this one just now presented as Defendants' Stipulation No. 2.

Mr. Merdes: That is the Northern Reefer?

The Court: That is with regard to the Northern Reefer.

Mr. Detels: If your Honor please, the defendants would like at this time to call Mr. Pinkerton.

The Court: There is no further opening statement that you would care to make that might help the Court as to [43] what you propose to prove? If you would care to, I think it may be helpful.

Mr. Detels: Very well, your Honor. In general we have no comments to make contrary to the remarks made by Mr. Merdes. I would add that the counterclaims in four of these suits also allege that the defendants are entitled to recover by virtue of Section 48-7-1 of the Compiled Laws of Alaska on the ground that payments heretofore made by them were over-payments through error or otherwise of taxes to the Territory. I think I might also state to the Court——

The Court: That is with reference to your counterclaim?

Mr. Detels: That is correct. From Mr. Merdes statement and from the Territory's brief it would appear that it is the Territory's contention that

Chapter 97 of the Laws of 1949, as amended in 1951 by Chapter 116, taxing the taking of fish, an act which occurs, so far as the evidence in this case will show, substantially all within the Territory of Alaska, and it is so conceded by the defendants; we are unable to segregate any fish as having been actually, physically caught outside the territorial waters of the Territory of Alaska; but our position is that this act does not tax the taking of fish; it taxes the prosecution of the line of business of operating a freezer ship, and the evidence heretofore introduced shows that the defendants' vessels are [44] operated outside what we contend to be the territorial waters of Alaska with the exception of periods in which fish were obtained as set forth in Appendix 2 to Exhibit 1 of the Plaintiff's Stipulation in this case.

Appendix 2 to Exhibit 1 specifies the number of fish obtained by the defendants for freezing during those operations in which defendants' vessels were anchored from time to time within three miles of mean low tide mark on the coastline of Alaska. Exhibit 16 to the Defendants' Stipulation in this case states the total number of fish obtained by the defendants at all times. The difference is the number of fish that were obtained or loaded aboard the freezing vessels outside the three-mile limit which we contend is the extent of the territorial waters of Alaska.

We say further with regard to that point that, if this tax were a tax on the taking of fish, that there would be no justification whatsoever for the dis-

crimination in the tax rates. If it is a tax on the taking of fish, there is no basis upon which the Territory could tax the taking of fish for a land-based cold storage at 1% and the taking of fish for a freezer ship at the rate of 4%, so our position there is that the taking, the point at which the fish are taken, is not relevant to a decision in this matter for the reason that the Territory in this act does not seek to tax the taking of fish but the operation of the defendants' line of business which [45] was the operation of a freezer ship.

The Court: Well, counsel, if your position is that the point of taking the fish is not relevant, then what as to the issue raised by the affirmative defense with regard to the validity of legislation as to your operation beyond the three-mile limit? Oh, I see. Your position is that it is not—that your operation of the freezer ships are outside the three-mile limit, so it is immaterial where the fish are taken.

Mr. Detels: For the purposes of this tax, your Honor, there is no argument that the Territory could, if it saw fit, tax the taking of fish inside the three-mile limit. Our position, again, is that this tax does not impose a tax on that act. It imposes a tax on the prosecution of several different lines of business, and the line of business which is claimed to bring us within the scope of the act is a line of business which is carried on substantially outside the territorial waters of Alaska as shown by Appendix 2 to Exhibit 1 as compared with Exhibit 16 showing the total number of fish obtained by the

defendants. The difference between those two exhibits is the number of fish obtained and loaded aboard the freezer ships outside the three-mile limit.

The Court: How are we to distinguish, counsel, between prosecution of a line of a business with which—you are correct that the statute actually imposes a tax on—between that portion of the operation which is done on the [46] freezer ships and that portion of the operation which is the purchase of fish or the taking of fish? Isn't it all one operation?

Mr. Detels: The taxes imposed, we say, your Honor, on the value of the fish obtained for processing through freezing and the moment at which the liability of the defendants for any tax attaches is at the time when they are processed or preserved by freezing.

Now, I think it would be conceded, perhaps I am wrong, that, if fish were taken by one of the smaller vessels and it capsized or was lost prior to the time that the fish were loaded aboard the freezer ship, that there would be no liability for tax under this act.

With respect to the defense that this tax is invalid under the commerce clause, we believe that the Territory's brief, as well as the evidence that we expect to introduce, will show that the purpose and effect of the act is to discourage or prevent the exportation from the Territory or from waters adjacent to the Territory of fish for canning in the State of Washington or elsewhere than in Alaska, and we say that is an effect which is forbidden by

the commerce clause. We say it is indistinguishable from a situation which we might invision of the State of Washington attempting to levy a tax of 4% on apples removed, apples extracted or grown in the State of Washington, removed to the State of Idaho for boxing in [47] comparison with a tax of 1% on the boxing of those apples in the State of Washington. We say that would be clearly invalid, and it is precisely the intent and effect of this statute.

The Court: You propose to offer proof to show that that is the intent or effect of the act?

Mr. Detels: We do, your Honor. With respect to the question of classification, we think that the classification question goes beyond the particular act which imposes this tax in that others engaged in similar activities are taxed at different rates. We say that there are four classifications made by the licensing, fisheries licensing, acts enacted by the Territorial Legislature. There is the classification made with respect to the defendants, freezer ships taxed at a rate of 4% on the value of fish obtained from processing through freezing. There is the tax imposed by subparagraph (a), the preceding subparagraph of this same act, which imposes a tax rate of 1% on shore-based cold storages on the value of their material obtained from processing through freezing.

Then we say the Court must also take into consideration another enactment of the same Legislature, Chapter 82 of the Laws of 1949, as amended, which is referred to as the raw fish tax, and that act

covers in part salmon canneries, both shore-based and floating, and they are taxed under Section 1 (a) (1) of the act. [48]

The Court: The specific tax in question here was added by the '51 Legislature, was it not, by amendment?

Mr. Detels: That is true, your Honor. The 1949 Legislature imposed the raw fish tax on salmon canneries, floating and shore-based, among others, and the tax rate was increased again in 1951.

Section 1 (a) (1) provides that: "Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value." So that salmon which are frozen by a salmon cannery and not later canned are taxed at the rate of 1%. Salmon which are frozen by a cannery and later canned, as are the defendants' fish, are not taxed at all. So this third classification of salmon canneries, shore-based and floating, has really two subclassifications—fish which are not later canned on which they are taxed at 1% for their processing, and fish which are later canned for which they are not taxed at all with respect to the freezing.

And, finally, we say there is a fourth classification which consists of vessels engaged in the transportation of fish preserved by means of ice, which operation was not taxed at all during the period involved in this suit.

We have no further statement to make at this time. [49]

Mr. Pinkerton, will you come forward and be sworn please?

Mr. Merdes: May I ask just one question, your Honor? Are they not going to press the confiscatory defense, affirmative defense?

Mr. Detels: I did not intend to waive that.

Mr. Merdes: You did, or did not?

Mr. Detels: I did not; no.

Mr. Merdes: You made no statement on it. I was just wondering if you intended to.

Mr. Detels: I meant merely to supplement your statement by one or two other matters.

The Court: All the Court asked for is a statement of what he expects to prove, not the final argument.

Mr. Merdes: I see.

JAMES G. PINKERTON

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Detels): Will you state your name please, sir? A. James G. Pinkerton.

Q. Will you spell your last name?

A. P-i-n-k-e-r-t-o-n.

Q. And what is your address, Mr. Pinkerton?

A. Box 901, Ketchikan. I live at 1025 Dunton Street.

Q. What is your occupation?

A. I am manager of the Ketchikan Cold Stor-

(Testimony of James G. Pinkerton.)

age Company, the public cold storage here in Ketchikan.

Q. In that capacity what lines of business do you engage in?

A. Our plant is engaged in the business of freezing fish, the manufacture and the sale of ice to fishermen, and the freezing and resale of bait to fishermen. Also in my position of manager of the plant I act as agent for stateside firms who would like to purchase and have frozen for their account salmon, halibut, and sablefish, and other fish up here, and I see to it that these fish are purchased, that they are properly processed, accounted for, and shipped.

Q. In your line of business is it necessary for you to be familiar with the fishing business in general with respect to matters such as the opening and closing of seasons and the activities of fishermen in this area?

A. Yes, it is. That is certainly a part of my business, because we can't buy fish out of season, which is illegal and contrary to law.

Q. Will you state whether or not to your knowledge salmon are frozen in the Territory of Alaska which are later canned in the Territory of Alaska?

Mr. Merdes: May it please the Court, at this [51] time I don't think a proper foundation has been laid for that question because he hasn't shown he is familiar with every single operation of the salmon operations in the Territory of Alaska, at Bristol Bay and Southeastern Alaska and all the other

(Testimony of James G. Pinkerton.)

places they can salmon. I can't see how he can answer a question like that unless he can say that he has been up there, unless he can say he saw them, and there has got to be a tremendous foundation laid for a broad question like that. How is he going to know that unless he was there and he so states that he saw the operation and saw them being canned.

The Court: The witness is not being asked about the salmon canning operation but his own business. He is the manager, and it is his experience based upon that.

Mr. Merdes: Fine. If that is restricted to the Ketchikan Cold Storage and he knows personally, then I have no objection.

The Court: Well, I have no desire to restrict the witness to the Ketchikan Cold Storage Company. I think he is sufficiently qualified to answer the question as to whether or not salmon are frozen and later canned. Objection overruled.

Mr. Merdes: In so far as Ketchikan is concerned. Unless he was up in Pelican and Juneau, he can't testify about Pelican and Juneau.

The Court: Objection is overruled. [52]

A. With respect to the question just asked, there is one species of fish which is taken in the summertime and for a period of time it is customary to can that fish after it has been frozen. I have reference to cohoe salmon, commonly known as silvers. The season for taking of this fish by trollers opens on July 1st and usually ends September 15th.

(Testimony of James G. Pinkerton)

At the beginning of the season for silver salmon the fish are small. They start showing up on the outside waters, the west coast of Prince of Wales Island and the edge of the ocean. They are under six pounds and due to their size they are unsuited for retail under the fresh frozen food market, the fish market and butcher shop. They are too small to be steaked, so it is more economical to can those fish to recover the investment. It is necessary for a fish buyer, such as myself, to buy those fish because we have our customers, our fishermen that fish for us, and, when they catch the fish, we have to take them, so they are later canned, and I do know of one cannery here in Ketchikan that each year takes from our plant fish of this species and under six pounds in size and cans them right here in Ketchikan, and it would be my opinion from my experience in the trade that fish taken in Southeastern Alaska at other ports under six pounds and of the silver or cohoe species would likewise be [53] canned somewhere by someone because they are not suited for the fresh frozen market.

The Court: Mr. Pinkerton, do you take only troll caught cohoes, or do you take the net caught cohoes for canning or for the fresh market?

A: Well, when the seining season is open for the canneries, any cohoes that are caught incidental to seining for pinks and chums would be canned by the canneries. They wouldn't come to our plant.

The Court: In other words, your plant takes only the troll caught fish?

(Testimony of James G. Pinkerton.)

A. Well, we would take the others if we had an opportunity, but normally, in the regular operation of the canneries, the seine boats and the packers, those few silver salmon that are caught are taken directly to the cannery and they are packed.

The Court: Generally, then, net caught salmon are not suitable for the fresh fish market?

A. You get a few bright dogs in the fall; you get a few; but the seiners that are out seining, they are working for the canneries, and they get their catch.

Q. (By Mr. Detels): With reference to the fish that you referred to earlier, which are frozen prior to canning, why are they not canned at that time?

A. No canneries are operating then. The [54] season, the troll season for cohoe salmon, opens the first of July, and it is later in the month, or even the next month, that the regular canning season opens and the seine fish season opens in this area. It varies from year to year.

Q. Incidentally, Mr. Pinkerton, how long have you held your present position?

A. I have been manager, full manager, for a year, and I was assistant manager for a year, and prior to that I was the accountant for the firm for six years. I have been with the company since 1948.

Q. You stated that you are also engaged in the business of selling ice. Did your company in the years 1954 and prior thereto sell ice to vessels for the preservation of fish for transportation from the Territory of Alaska to points outside the Territory of Alaska?

(Testimony of James G. Pinkerton.)

A. Yes. That occurs in the fall season. We have a special five-day or six-day season in the fall of the year. This year it was from September 24th to October 1st, but due to the shortage of fish the season was reduced to three days only.

Mr. Merdes: May it please the Court, I want to object to the form of the question, in so far as for outside use, selling ice for outside use. He hasn't shown defendant knows. I want to know where defendant got that information.

The Court: I think he is sufficiently [55] qualified, counsel. It is his own plant.

Mr. Merdes: He sells it, your Honor, but whether it is for outside use is another matter.

The Court: You may cross-examine upon that point, but I think he is sufficiently qualified. Objection overruled.

A. To continue on that question, each fall during a period of the latter part of September or early part of October there is anywheres from three, four, five or six vessels come to our dock for quantities of ice varying from fifteen to forty thousand pounds, and this ice is used to preserve seine caught salmon which is later delivered to Puget Sound canneries.

Q. (By Mr. Detels): You have been referring in your testimony to the years in which you have been employed in one capacity or another with the Ketchikan Cold Storage?

A. That is correct; since 1948.

(Testimony of James G. Pinkerton.)

Mr. Detels: I have no further questions, your Honor.

Cross Examination

Q. (By Mr. Merdes): Mr. Pinkerton, you said that these four boats got ice for seine caught salmon which were subsequently sent to Puget Sound for canning. Who told you that?

A. The skipper on the boat.

Mr. Merdes: I object. [56]

Q. (By Mr. Merdes): Were you in Seattle, and did you see the boats?

A. I saw the boats when they went south loaded with fish.

The Court: Do you object to your own question?

Mr. Merdes: No. I object—that is not the final question.

Q. (By Mr. Merdes): Now, you said that——

The Court: Do you object to the answer?

Mr. Merdes: No. I object to any testimony of his that these iced ships went to Puget Sound and canned these salmon.

The Court: Counsel, I do not believe that this is hearsay. The skipper of the vessel states the purpose for which he wishes ice. Objection overruled.

Mr. Merdes: The Court says that that is admissible hearsay?

The Court: I said it is not hearsay.

Mr. Merdes: Oh, it is not hearsay?

The Court: Yes, sir. The answer may stand.

Q. (By Mr. Merdes): Mr. Pinkerton, you said that you are qualified in the cold storage business

(Testimony of James G. Pinkerton.)

and you are familiar with its operations. Now, Mr. Detels asked you certain questions about your operations, and I would like to clarify a few points. One is—what percentage of your business would you say, of the fish you get in a [57] typical year, including six-pound cohoes, are subsequently canned as compared with the amount of fish that is subsequently sent on the fresh fish market?

A. Well, the cohoes start out about the first three weeks being under six pounds. They gain weight quite rapidly after they get into inside waters and start eating on our local herring. I would say it would run about twenty—twenty-five per cent.

Q. Of your entire business?

A. Of our cohoe salmon.

Q. Oh; oh.

A. Cohoe salmon. We freeze lots of halibut.

Q. That is correct. Now, of your entire business—halibut, salmon and everything—what percentage of that entire business are six-pound cohoes that are canned? A. Well, that——

Q. It would be very nominal, would it not?

A. We could go back to a year in 1948 or '49 when we froze a million pounds of pinks that were seine caught, and that amounted to an appreciable portion.

Q. That may be true, but I asked you about six-pound cohoes which you mentioned on direct testimony. I want to know whether this is an isolated instance; or, what is the major part of your busi-

(Testimony of James G. Pinkerton.)

ness; is it for the fresh food market or for canning? [58]

A. Fresh food market.

Q. No question about that? A. No.

Q. In other words, anything canned is an isolated, incidental thing; isn't that correct?

A. That is right. They have to recover their money out of it.

Q. That is right.—Now—so—are you familiar, Mr. Pinkerton, with the freezer ship operations; with the operations of the freezer ship? Is it not true that in a conversation with me the other night you stated that you were familiar with the operations of freezer ships?

A. I know what a freezer ship is. I know what they do. That is correct.

Q. That is correct. Now, what type of fish do freezer ship operations catch and freeze?

A. They freeze aboard freezer ships mainly three species: chums, that is your dog salmon; pinks, that is your humpies; and reds, which are your sockeyes.

Q. And they subsequently——

A. Can those. There might be a few kings caught incidental to the other fish which are canned.

The Court: You said, "And they subsequently can them". The freezer ships?

Mr. Merdes: The freezer ships. [59]

A. Well, they are later canned.

The Court: They are later canned. Not by the freezer ships? A. Not aboard.

(Testimony of James G. Pinkerton.)

Q. (By Mr. Merdes): Some outfit in Seattle; isn't that true?

A. That is right. They are taken to Puget Sound.

The Court: And later canned?

A. Later canned. Those three species of fish lend themselves better for canning than for the fresh fish market.

The Court: Well; what I mean is—you testified that the freezer ships later canned them. They are taken "Outside" for canning—by the freezer ships?

A. That is right. They are delivered to Puget Sound for canning; yes.

Q. (By Mr. Merdes): Well, is it not a true statement based on those facts, Mr. Pinkerton, that floating freezers who freeze and subsequently can seine caught fish are not in competition with you for your primary product? Is that true?

A. That is correct.

Q. They are in no competition whatsoever with you and the fresh food market, are they?

A. There is no competition in our business.

Q. In other words, Mr. Pinkerton, the type of fish that you prize and the type of fish that you catch are the [60] troll caught, higher expensive fish; isn't that correct?

A. Troll caught salmon, the long line caught halibut and the sable fish.

Q. Then you would say, Mr. Pinkerton, would you not, that, if the higher taxes, or, if they had higher business expenses in operating a freezer

(Testimony of James G. Pinkerton.)

ship, that that would not affect or lower expenses, that that would not affect your business whatsoever?

Mr. Detels: I object.

The Court: It may be proper cross examination, but otherwise it certainly wouldn't be proper.

Mr. Merdes: It is cross examination.

A. I am quite conversant with my cost of operation.

Q. (By Mr. Merdes): Well, I mean—would you answer the question? Would you tell me whether or not any cost of their operation affect you competitively, as far as you marketing your fish is concerned?

A. No; because their fish goes in a can and mine goes on the fresh frozen market.

Q. That is what I wanted to get straight. Now, Mr. Pinkerton, do you freeze your fish through a brine process; do you use salt brine to freeze your fish? A. No. We use direct contact.

Q. Do you know the manner in which the freezer ships freeze their fish? [61]

A. Yes, I do.

Q. They use what process? A. Brine.

Q. Mr. Pinkerton, do you pay local taxes to the City of Ketchikan, real property taxes?

A. We are, I believe, the largest tax payer within the city limits.

Q. You are. Do you pay quite a tax to the Territory? A. Yes, we——

Mr. Dimond: If the Court please, I think that

(Testimony of James G. Pinkerton.)

we made objection to one of the exhibits in relation to the payment of property taxes. I can't recall how the Court ruled on that. Did you take it under advisement for future ruling?

The Court: We simply held that the matter of payment of other taxes may be material to that issue, the issue raised here as to discrimination.

Mr. Dimond: I want to make the objection.

The Court: The same objection then is understood. It is time now for our noon recess.

(Whereupon the trial was recessed until 2:00 o'clock p.m., November 8, 1955, reconvening with all parties present as heretofore; the witness James G. Pinkerton resumed the witness stand, and the Cross-Examination by Mr. Merdes was continued as follows:) [62]

Q. Mr. Pinkerton, do you have any business association or any business dealing with any of the defendants in this case? Are you an agent for any of these defendants?

A. Let's see. We were on some other questions when we recessed. You are starting a new line of questions?

Q. Yes.

A. Well, the names of the corporations — no. There might be involvements between corporations.

Q. Well, take for example—who owns the Arctic Maid? A. She is a corporation.

Q. She is a corporation?

A. As far as I know.

(Testimony of James G. Pinkerton.)

Q. Do you have an association with the corporation that owns the Arctic Maid?

A. I shipped some fish aboard her this year.

Q. Do you represent the Arctic Maid? Do you buy for them in the Territory?

A. Not the Arctic Maid Fisheries; no.

Q. The company that owns the Arctic Maid?

A. Well, I understand there is a connection between the Arctic Maid and Washington Fish & Oyster, whom I did represent.

Q. Yes. All right. Now, Mr. Pinkerton, reverting back to our previous line of questioning, which, as I remember, pertained to the type of operation that you have down [63] here. Now, the fish you take in, are they frozen in the round, or are they dressed, primarily?

A. Halibut is dressed. It is headed on our dock, and then it is washed and frozen. Salmon is bought with the head on and guts out and frozen dressed. If it is a gill net fish, we can freeze it round or dress it, and seine fish the same way; but, normally, seine fish is frozen in the round.

Q. I get you. In other words, basically, most of your fish, or the overwhelming majority of your fish, is frozen after dressing, after it is gutted and so forth? A. Yes; that is right.

Q. Now, how much fish do you freeze in the round, would you say, bait fish for example? Do you freeze your bait fish in the round?

A. Yes. Herring is all frozen in the round. We

(Testimony of James G. Pinkerton.)

freeze about a million and a half pounds a year. That is all in the round.

Q. That is bait fish; that is not canned or anything?

A. That is right. And, if we get a chance to buy some cod or some dogs or pinks unsuitable for canning, we sell that for bait, and it is frozen in the round.

Q. Now, you said that you were familiar with freezer ship operations. Now, how do freezer ships, do they dress their fish or do they freeze them in the round? [64]

A. They would throw them in the brine and freeze them in the round.

Q. Now, Mr. Pinkerton, in connection with your operations as a land-based cold storage operator, do you have considerable longshore expense?

A. Yes. Everything that is shipped from our dock is handled by longshoremen, other than ice and bait; our own crew takes care of that.

Q. In other words, when a freezer ship gets their fish, there is no longshoring expense involved, is there, obviously, from taking the fish onto the boat; the only longshoring expense is down in Seattle; isn't that correct?

A. No. They would have no longshore expense in loading the fish from the fishing vessels to the freezer ship.

Q. But you do?

A. No. No. Let's take that operation step by step. Longshoremen do not have jurisdiction on

(Testimony of James G. Pinkerton.)

handling of fish from the vessel that catches it at the time it is unloaded from the fishing vessel to either a freezer ship or a cold storage plant. It is after the processing is done and it is being shipped in interstate commerce that they would have jurisdiction.

Q. I see. A. Or to another port. [65]

Q. Thank you for clarifying that point.

* * * * *

Redirect Examination

Q. (By Mr. Detels): Mr. Pinkerton, I believe you were asked on cross examination whether the operation, in which cohoe salmon of a certain size are frozen prior to canning, was an isolated instance. Now, would you state to the Court just to what extent that operation is carried on with respect to when it occurs during the year and whether or not it occurs consistently over a period of years?

A. It is a regular occurrence each year, and, while the percentage of fish canned because they are under six pounds may seem relatively small, that is of vital importance to the purchaser or the owner of those fish because he cannot dispose of them on the fresh frozen market, and, if he were not able to can them to recover his investment therein, if he lost 20% of his purchases, he would be in the red on the whole operation, so it may be small but it is very important that they be able to divert that to a cannery, preserve the fish through freezing and divert to [66] a cannery at

(Testimony of James G. Pinkerton.)

a convenient time and liquidate their investment through that means. [67]

* * * * * .

Whereupon, the

DEPOSITION OF WALLIS GEORGE

was read as follows—questions by Mr. Dimond and answers by Mr. Defels:

(Reading)

Q. Would you please give your name and address?

A. Wallis George, Juneau, Alaska.

Q. What is your business and occupation, Mr. George?

A. President and Manager of the Juneau Cold Storage Company.

Q. And will you give briefly your experience and background in this field, in the cold storage business?

A. Well, my experience with the Juneau Cold Storage Company extends over a period of about [68] twenty-seven years. That, I think, should cover it.

Q. During that period of twenty-seven years did you have occasion to have personal experience with the fish processing through freezing?

A. I do.

* * * * *

Q. Now, when you purchase the fish, you discussed the process which they go through. Are any of them frozen in the round?

(Deposition of Wallis George.)

A. Yes, we freeze fish occasionally in the round, principally for bait purposes.

Q. About what percentage are frozen in the round and what percentage are dressed?

A. The percentage we freeze in the round is very small. We have frozen during a heavy run of salmon from traps, more than the canneries could take care of, as high as—execuse me before I go ahead—you are talking about the year 1954 or——?

Q. Well, I didn't mean any particular year. I just wanted to get a general——

A. Well, the figures I am about to give you do not apply to 1954. [69]

Q. Well, if you could state what——

A. But we have frozen as much as one and a half million pounds from nearby canneries which was in excess of what they could can. They were frozen in the round.

Q. You mean the canneries would be plugged up and you would freeze these fish and they would take them and can them later?

A. Yes, that's right.

Q. Now, with respect to those fish that you froze for the canneries, would you pay a one per cent processing tax on those fish?

A. No, we did not. That was a cannery deal. We paid no processing tax on it.

Q. As far as you know, the cannery paid the processing tax on it?

(Deposition of Wallis George.)

A. Yes, that is right. That was the understanding. We had no tax to pay on it.

* * * * *

Q. Well, do you know, then, based upon your familiarity with other land-based cold storages in Alaska — I suppose principally Southeastern — do you know whether any of the others freeze fish for ultimate canning, as you have done [70] you testified—one and a half million pounds? Have any of the other cold storages utilized a similar method?

A. Well, I presume the same business that is offered to us is accorded them also.

Q. You don't have anything of your own knowledge on that?

A. No, but I do know they have frozen fish in the round; yes.

(Reading suspended)

Mr. Dimond: And now I would like to turn to Page 19, Line 16.

The Court: Just for the Court's information here—perhaps counsel would not know—by "frozen in the round" you mean without being dressed in any way; that is what the term means, I assume.

Mr. Dimond: Yes, your Honor. Page 19, Line 16.

(Reading resumed)

Q. Mr. George, you testified you have seen floating cold storages in operation; one in Puget Sound, wasn't it?

A. No, I think you have got me wrong, John. I said on the San Juan dock in Seattle I saw this

(Deposition of Wallis George.)

brine ~~freezing~~. I have never been aboard a floating cold storage.

Q. I see. So you don't know how they operate, do you?

A. No, but the principle is the same as ours, it can't be otherwise, other than one is brine and the other sharp freezing.

* * * * * [71]

Q. All right. Now, any fish that were frozen in this separate operation you have for canning this year—hand-packed as you call it—they would pay a raw fish tax to the Territory; is that right—on the fish? A. That is right.

* * * * *

Q. Now, with respect to your own cannery, that is the one that you operate in conjunction with Kayler-Dahl Fish Company, did you say in answer to Mr. Merdes' question that all of the fish canned there are not frozen?

A. Yes; all the fish go fresh, not frozen.

Q. Did you ever intend to use the frozen fish?

(Reading suspended)

Mr. Dimond: There is an objection here by Mr. Merdes. Shall I read that in the record?

The Court: Yes.

(Reading resumed)

Mr. Merdes: For the purpose of the record, I object to that question because I think it is clearly irrelevant. [72]

(To Mr. George): You can answer that.

(Reading suspended)

(Deposition of Wallis George.)

The Court: Just a moment. Would you repeat the question?

(Reading resumed)

Q. Did you ever intend to use the frozen fish?

(Reading suspended)

The Court: It appears relevant. He may answer.

(Reading resumed),

A. If the run was so heavy that our cannery couldn't take care of it in the fresh state, naturally we would freeze them to hold them.

Q. How do they operate when the fish are frozen and then brought to a cannery — do they thaw them some way and then can them? Do you know how the cannery operates?

A. I didn't just get the first part of your question.

Q. Do you know how the cannery operates when they get fish frozen in the round and then can them?

A. Yes, I think I do. In our case here, if we freeze fish for our own cannery, we would take them out of the freezer probably twenty-four hours ahead of the time before we were ready to can them, to give them time to defrost, so that they would be soft, in a fresh condition, when they reached the cannery, not frozen.

(Reading suspended) [73]

Mr. Dimond: That is all that we have on the deposition of Wallis George, may it please the Court.

The Court: Does the plaintiff wish to offer any further portions of the deposition?

Mr. Merdes: Yes. We are going to read the entire rest of the deposition in rebuttal due to the fact that they read part of it.

The Court: You wish to introduce it in rebuttal?

Mr. Merdes: Yes, your Honor, or we could do it now, if you want an orderly trial procedure, if you want that done.

The Court: Well, it could be done probably under the theory of the cross examination; well, not necessarily. If you wish to offer it in rebuttal, that is perfectly satisfactory.

Mr. Merdes: The reason we do, obviously, because, well, it will be explained.

The Court: Very well.

Mr. Dimond: Now, if the Court please, I would like to read portions of the deposition of Thomas Sidney Parke. We will start on Page 31, Line 17.

Whereupon, the

DEPOSITION OF THOMAS SIDNEY PARKE

was read as follows—questions by Mr. Dimond and answers by Mr. Detels:

(Reading)

Q. Isn't it true that some fish that are frozen [74] in land-based cold storages are ultimately canned?

A. It is true to some extent. The only time that actually is done, due to the fact that it is an expensive operation, is when there is a big run of fish and the canneries are unable to handle the fish and in that case they usually bring them to

(Deposition of Thomas Sidney Parke.)

the cold storages and have them stored until such time as they can can them. Ordinarily that is done in the local canneries throughout Alaska, just merely a storage place for them for the time being.

Q. Do you know whether such operations have been conducted at, for instance, the Pelican Cold Storage and Pelican Packing Company?

A. Yes, I do know that the Pelican Cold Storage preserved fish—I am not so sure of the year, but I believe it was '49, the year they had a big run and they weren't prepared for it. The canneries weren't geared for it, but I don't know of the Pelican Cold Storage holding fish for the Pelican Canning Company. I know that is a very expensive operation to actually do both types, so it isn't readily done.

Q. How do you know it is expensive?

A. Just from facts I have been told throughout the operation. They avoid it if they possibly can.

* * * * * [75]

Q. Well, Mr. Parke, with respect to these cold storages which in some instances freeze fish which are later canned, do you know whether or not a cold storage tax is paid on those fish in addition to a raw fish canning tax?

A. No, ordinarily they come under the Alaska Business License Law, the business of preserving the commodity. In other words, that is a business in itself.

Q. Let's take the fish that is frozen, say in the Juneau Cold Storage, frozen in the round and then

(Deposition of Thomas Sidney Parke.)

it is held because the near-by cannery is plugged up, and later it is thawed and canned. What tax is paid with regard to these fish?

A. That reflects in Wallis George's business license return for handling those fish.

Q. Then the cannery doesn't pay a tax on the fish?

A. The cannery goes ahead and pays the case tax.

Q. In addition to the cannery tax there is also the one per cent fish tax?

A. One-half per cent on a business license return, in a cold storage fish processors' return. It would be under the Alaska Business License Tax. Your fish that are purchased over the dock supposedly by the Juneau Cold Storage, which includes in the Juneau instance Elton Engstrom, who pays the processor's tax of one per cent, but the cold [76] storage itself is under a different law, the Alaska Business License Law, of the services of freezing the fish, so they themselves aren't the processor.

Q. But the Juneau Cold Storage, for example, doesn't pay one per cent of the value of that fish?

A. Not the one that goes into the can. They would pay one-half a per cent.

Q. Of the value of the fish?

A. No, one-half a per cent of the total gross receipts.

Q. For all of their business? A. Yes.

* * * * *

(Deposition of Thomas Sidney Parke.)

Q. Are you familiar with other floating canneries in Alaska? A. Yes, I am.

Q. Such as Neva Pacific, American Fisheries?

A. Yes.

Q. How about La Merced Peninsula Packers?

A. La Merced; yes.

Q. Alaska Queen? A. Yes.

Mr. Merdes: Excuse me. For the purpose of the record, I would like to object to these questions about packers and questions about land-based canneries. The things involved [77] here are floating freezers and shore-based cold storages. Just for the record.

(Reading suspended)

The Court: Do you urge that objection?

Mr. Merdes: No, I don't.

Mr. Dimond: Then continuing on after that.

(Reading resumed)

Q. How about Northern Canadian, and Penaco, and Kayak—have you heard of those floating canneries? A. Yes.

Q. Now, are these floating canneries taxed?

A. Yes, they are.

Q. Under what law?

A. Under Chapter 82 SLA '49.

Q. Are they taxed the same as land-based canneries? A. Yes.

Q. You don't see any distinction between floating canneries and land-based canneries?

A. No; they both pay a maximum tax. Their products are completed in Alaska and the fish are

(Deposition of Thomas Sidney Parke.)

completely canned, ready for the consumer, when it leaves here. [78]

* * * * *

Q. Mr. Parke, you claim in answer to defendants' interrogatory—I believe it is No. 3—which has been set forth in Plaintiff's exhibit to be attached to the deposition, Exhibit No. 1, that you have incurred expenses in addition to routine office expenses in the collection and enforcement of the tax on freezer ships. Is that correct?

A. Yes, sir.

Q. Now, for 1949 and 1950 you show that the office expenses, in addition to routine office expenses, were fifty dollars for 1949, and one hundred dollars for 1950. Is that correct?

A. To the best of my knowledge, yes.

Q. There was no travel and per diem?

A. At that time the freezer ship operation was very minor.

Q. But there was no travel and per diem?

A. No. I believe those figures were an estimate on the time it would take off of regular trips to——

Q. Can you tell me what that fifty dollar expenditure was in 1949?

A. '49 and '50 were an estimate on outside investigation of the operation.

Q. Can you be more specific now?

A. At that time the freezer ship operation was, [79] the same as the cold storage operation.

Q. The operation was the same as the cold storage?

(Deposition of Thomas Sidney Parke.)

A. The tax was computed the same.

Q. Well, you can't be more specific on the breakdown of the fifty dollars in '49 and the one hundred dollars in '50?

A. One year — off-hand — I haven't the record right here to show it, but they investigated a couple of boats at Clark's Point, the Michel Eva was one boat that was trying to operate. That was the first of the freezer operations.

Q. What year was that?

A. I believe it was in either '49 or '50. There was one there then, and then there was the Midas operating up there in '50, I believe that was the year. We had the Pacific Reefer and the Southern Queen. The Southern Queen is the one I was trying to think of. This boat, the Midas, I remember investigating on that. We found out that he had gone up to try to freeze fish and then bring them out, but it turned out to be—he ended up being a packer for one of the companies. In fact, he sold to Nick Bez.

Q. I don't mean to drive this into the ground, but what did the fifty dollars consist of in 1949?

A. It would probably be wages for the time it took for investigating in the north there.

Q. And the same for the hundred dollars in 1950? [80]

A. Yes. At the time it was compiled, why we went back over all our records and from memory and so on, that we had spent time on it.

Q. You keep a record of all your time?

(Deposition of Thomas Sidney Parke.)

A. To some extent.

Q. This was for investigation?

A. Yes, to find out what the operation was there. As far as tax-wise, it was part of investigation to find out what his operations were. Off-hand, I presume I received some licenses at the same time.

(Reading suspended)

Mr. Dimond: If the Court please, that is all of the deposition of Mr. Parke.

The Court: Are you reading from both the direct and cross examination?

Mr. Dimond: All of the—all of what was read from Mr. Parke's deposition was from the cross examination.

The Court: I see. Do you wish to offer any?

Mr. Merdes: On rebuttal.

The Court: On rebuttal.

Mr. Dimond: We thought the rest of it was entirely irrelevant, your Honor.

Mr. Merdes: One side.

Mr. Dimond: Now, if the Court please, I would like to read into evidence, I think it is the proper [81] way to proceed, an interrogatory from defendants to plaintiff and the plaintiff's answer thereto. It is Interrogatory No. 10 of defendants' interrogatories to plaintiff. I could read the question first and then——

Mr. Merdes: The first or second set?

Mr. Dimond: The first set of interrogatories.

"Interrogatory No. 10—If there are any differences in the operation of freezer ships and floating

cold storages as opposed to shore-based cold storages which are claimed to support their separate classification for tax purposes, other than a difference in the cost of enforcement and collection of taxes, if any, state the distinctions relied upon."

I would like now to read the answer, if the Court please.

"Answer to Interrogatory No. 10—Other than a substantial difference in the cost of enforcement and collection of taxes, there are numerous other differences that justify a classification as between freezer ships and floating cold storages as opposed to shore-based cold storages and other land-based fish processors. Some of these are as follows:

"(1) The extreme difficulty in securing jurisdiction over said freezer ships for the purposes of suit and routine tax billing. They are extremely elusive and difficult to find since their activities are not officially reported to the Territory and they are [82] continually on the move. They leave the Territory completely for periods in excess of nine months after the termination of their season's fishing operation. If they fail to file a return or pay their taxes the Territory has no remedy unless the freezers operate in the Territory during the next summer. Even then there is no assurance they will be found. If they do not return to Alaska the next summer, there is no possibility whatever of collecting the taxes.

"(2) The freezer ship owners have no security or property physically located in the Territory against which the Territory can attach or file a

lien to secure the payment of taxes, whereas land-based cold storages own millions of dollars of valuable realty and personalty which is physically located in Alaska. This distinction probably explains, in part, why land-based processors have paid substantially all their accrued taxes, while freezer ship owners have been flouting the law by willfully refusing to even file a return, let alone pay their taxes.

"(3) The freezer ships import practically all of their employees from outside the Territory and these employees seldom are ashore, but spend most of the season aboard the boat, whereas shore-based plants employ local help, thus sustaining, in some instances, whole communities which are dependent upon fishing for a living and bringing increased revenue to local businesses and the Territory in general. [83]

"(4) The freezer ships import most of their equipment and supplies, thereby depriving local businesses of this revenue.

"(5) The freezer ships store fish caught in Territorial waters in bulk aboard their boats and transport it south themselves, whereas shore-based plants box and process their fish ashore and ship their fish by common carrier, thus giving Alaska increased employment and revenue.

"If all of the fish frozen aboard freezer ships were canned or processed in Alaska, instead of the States, it would require a sizeable industry to care for them aside from the fact that the Territory

would collect about twice the tax that the freezer ships are now paying.

"These considerations alone justify a separate treatment and tax classification for the elusive floating freezers, as compared to the relatively stable and easily accessible land-based fish processors and cannery operators."

I would like to read that into evidence, your Honor, for the purpose of showing what the Territory's claim is for the basis of classification between land-based and floating freezer ships and only for that purpose.

The Court: That was all No. 10, Answer to Interrogatory No. 10, as I understood it?

Mr. Dimond: That was plaintiff's answer to defendants' Interrogatory No. 10. I forget the date [84] of the interrogatories.

The Court: Just roughly, so that I can find it later.

Mr. Dimond: It was the first set of interrogatories of the defendants'.

Clerk of Court: Those answers were filed on January 17th.

Mr. Detels: Is your Honor ready to proceed?

The Court: Yes. You may proceed.

HOMER KYROS

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Detels): Will you please state your name for the record? A. Homer Kyros.

(Testimony of Homer Kyros.)

Q. How is that spelt? A. K-y-r-o-s.

Q. What is your residence address, Mr. Kyros?

A. My residence is in Issaquah, Washington; Route 2, Box 6700.

Q. Will you spell "Issaquah" for the reporter?

A. Issaquah.

Q. What is your business address, Mr. Kyros?

A. Pier 54, Seattle, Washington. [85]

Q. What is your principal occupation?

A. Well, I am the managing owner of the Arctic Maid, also captain of the Arctic Maid, the freezer Arctic Maid.

Q. Well, that is a corporation, is it not?

A. That is correct. I am one of the officers of the corporation.

Q. How long have you been connected with the operations of the vessel Arctic Maid in waters north of Dixon Entrance? A. What is that?

Q. How long have you been connected with the operation of the vessel Arctic Maid in waters north of Dixon Entrance?

A. I have been running the Arctic Maid since it first was converted to a freezer ship in 1952.

Q. Now, Mr. Kyros, where are the operations of the Arctic Maid and the other freezer ships carried on during the Bristol Bay red salmon season with reference to the coastline of Alaska at low tide?

Mr. Merdes: Before you answer, Mr. Kyros—your Honor, I am going to object to his answer concerning other ships. He can speak for the Arctic

(Testimony of Homer Kyros.)

Maid. There is no foundation laid that he observed other ships. If they weren't in the area, they were out of his sight.

The Court; The answer may be confined, pending further inquiry, to your own knowledge of the Arctic Maid. If it develops the witness has knowledge of his own with [86] regard to the others, then that is a subject that may be inquired into.

Q. (By Mr. Detels): Mr. Kyros, as the master of the Arctic Maid, do you have an opportunity to observe or know the locations and operations of other freezer ships?

A. Well, Bristol Bay is, I would say, a small area; it really isn't; but the freezer ships do anchor within, most of the freezer ships, I should say, anchor within the same area of a mile or a half a mile of each other, and the anchorages are usually offshore—in certain districts they vary a little—but Egegik, for instance, which is one of the principal fishing areas for the freezers, we lay off four or five miles off the coastline.

Q. Well, you do physically observe the movements of the other freezer ships or a good number of them during the operations in Bristol Bay during the red salmon season? A. I do; yes.

Q. Can you state where those operations, both of the Arctic Maid and the other vessels which you have an opportunity to see, are carried on with reference to the coastline during the red salmon season?

A. We usually—we anchor off of the beach in

(Testimony of Homer Kyros.)

certain designated areas—I say designated—from year to year there are certain anchorages that we picked out, and we drop our anchor there for the season—which lays three to four [87] miles off the beach, to six miles sometimes.

Q. Now you are speaking of the anchorage of the freezer vessel itself?

A. That is what I say, the freezer vessels.

Q. Now, the actual fishing is not done by the freezer vessel; is that correct?

A. No; it is not.

Q. Where are the operations of the catcher boats, which do the actual fishing, concentrated generally?

A. Well, the catcher boats operate right from the beach on out, as far as the Fish and Wildlife limits will allow them, principally along the shore or wherever the fish happen to be at the time.

Q. Now, does the Arctic Maid, has it operated during the years 1952 to 1954, otherwise than during the Bristol Bay red salmon season, in other areas or during other fishing seasons?

A. What are those years again?

Q. 1952, 1953 and 1954.

A. Well, in '52 we just operated Bristol Bay area. In '53 and '54 we operated in the Kodiak area.

Q. Now, where would the vessel be in relationship to the coastline of Alaska during your operations in Kodiak?

A. Well, we would be in the bays and close to the beaches most of the time. [88]

(Testimony of Homer Kyros.)

Q. Now, has the Arctic Maid operated under your control in Southeastern Alaska?

A. Yes, it has.

Q. Where was it during those operations with relationship to the coastline?

A. That also was within the bays of Southeastern Alaska.

Q. Has it operated in any of the years 1952, 1953 and 1954 fishing for king salmon?

A. No.

Q. Are you familiar from your knowledge of freezer ship operation with the location of freezer ship vessels that do engage in the king salmon fishing? A. Could I have that again, please?

Q. Do you know where freezer ship vessels, that engage in king salmon season operations, are with relationship to the shore?

A. Yes. Most of the king salmon fishing is done in the Nushagak River, and they are in close to the beach—I would say—depending—from a half a mile and anywheres up from there.

Q. Now, with reference to the Bristol Bay red salmon season, does it occur that your vessel, or other vessels of which you had knowledge in the freezer ship business, would be within three miles of shore—by shore, referring to the low tide area?

A. Well, speaking for my vessel only in this case — I can't say for the rest — but I don't get within three miles, principally because of the condition of the bay it is unfeasible.

Q. Are there circumstances of which you know

(Testimony of Homer Kyros.)

in which some freezer ship vessels would from time to time anchor within three miles of the mean low tide mark?

The Court: You are speaking of Bristol Bay, counsel?

Mr. Detels: Yes, I am. The question relates to the Bristol Bay red salmon season.

A. Well, I believe there may be instances when a boat of a shallower draught may, if the wind happens to be from the southeast, which may seek protection from the coastline; they may try to get in a little closer to get out of some of the heavier seas.

Mr. Detels: We have no further direct examination.

Mr. Merdes: If the Court will allow me just a minute, I want to discuss this with co-counsel. No cross examination.

The Court: Just because the Court is more thoroughly familiar with the picture, Mr. Kyros, have you operated in Prince William Sound or the Copper River area?

A. The Arctic Maid has never operated in Prince William Sound or the Copper River area.

Mr. Merdes: I would like to ask him—it reminds [90] me now of a question, your Honor.

Cross Examination

Q. (By Mr. Merdes): Mr. Kyros, how far up in Bristol Bay is Naknek and the Nushagak River? Is that how you pronounce it?

A. What is that question again?

Q. How far up in Bristol Bay, physically, is

(Testimony of Homer Kyros.)

it quite a ways up or half way up in Bristol Bay where you anchored to receive these fish? I am just trying to get the geography.

The Court: You are speaking of the Naknek and the Egegik Rivers?

Mr. Merdes: I am just trying to get an idea, physically.

A. Well, I will tell you; from the mouth of the Naknek River, which is near the head of Bristol Bay, back westward to Egegik is approximately twenty-three or four miles, and the bay there from Egegik across is approximately, I would say, fifteen miles to the opposite westward shore, and the bay continues up the Kvichak River, which is also a fishing area.

Q. Now, you usually anchor, you say, off these two rivers, and your catcher boats go near the mouths of the rivers between Middle Bluff and Red Bluff, as they call it?

A. Middle Bluff is one of them. [91]

Q. Right off the continental shelf there, and the catcher boats get them near shore, as you state. Now, I would like to ask you another question, Mr. Kyros. Have you paid your fish processing tax to the Territory for the years you operated up there in Bristol Bay?

A. We have paid, yes, I am sure we have paid at a cold storage tax, whatever that happened to be.

Q. Why did you pay the cold storage—at that rate?

A. Well, now, the office or the bookkeeper who

(Testimony of Homer Kyros.)

handles our books had figured we were a cold storage operation, and we paid under that heading.

Q. In other words, you construed the law as being applicable to your operations but only to the extent of 1%; isn't that correct?

Mr. Detels: Objection, your Honor. We don't feel that it is material how this witness construed the law. There is a stipulation in evidence as to what payments were made by the corporation of which he is an officer and a stipulation as to the amount of tax liability claimed by the Territory.

Mr. Merdes: It is cross examination.

The Court: That should suffice. In cross examination of course certain latitude is permitted, but the question as to how the witness construed the law would seem to be argumentative and not proper cross examination.

Mr. Merdes: I will withdraw that question. [92]

Q. (By Mr. Merdes): In other words, Mr. Kyros, you paid a 1% tax on the operations up there because you consider your operations up there as to taking of fish from Alaskan waters, right, and you paid a 1%, not a 4%, a 1% tax to the Territory of Alaska?

Mr. Detels: Same objection, your Honor.

The Court: I think he can answer that.

A. First of all, let me say——

The Court: Unless that is all stipulated in the record; if it is, why then——

Mr. Merdes: Well, I am trying to—let him answer the question and——

(Testimony of Homer Kyros.)

The Court: Well, he may answer it.

A. First of all, I may say that I don't know, when the tax was paid, who decided. That isn't my department. My department is to run the boat and to bring in the fish. Someone decided that that way, evidently, if that is how it was paid.

Q. (By Mr. Merdes): Now, Mr. Kyros, did you file a Territorial income tax return?

Mr. Detels: Objection, your Honor.

The Court: Just a moment.

Mr. Merdes: Your Honor——

The Court: That is not proper cross examination, nor can I see where it would be relevant. [93]

Mr. Merdes: It would show a justification for the classification. They don't pay their taxes. They don't even not only pay their processing tax, their complete processing tax, but they don't even pay their income tax; and these fish were caught in the Territory; they are a resource of the Territory.

The Court: In any event, it is not proper cross examination. Objection sustained.

Mr. Merdes: I will put him on as my own witness afterwards then. For the purpose of this question I would like to put him on as my own witness.

The Court: Now?

Mr. Merdes: Well, either now—unless they have redirect.

The Court: Very well. Now, then will you repeat the question?

Q. (By Mr. Merdes): Have you paid a Territorial income tax based on—have you filed a Terri-

(Testimony of Homer Kyros.)

torial income tax return based on the operation that you had in the Bristol Bay area in Alaska?

The Court: What do you mean by "you"?

Q. Or, the Arctic Maid?

A. The Arctic Maid Corporation?

The Court: Just a moment. I presume you renew the objection, counsel? [94]

Mr. Detels: We do, your Honor. In fact the Territory's brief and the stipulation herein specify that the Territorial income tax is one of the taxes which are paid by land-based cold storages and shore canneries which are not paid by these defendants.

Mr. Merdes: That is true. That is what I am trying to show, that it is not paid.

Mr. Detels: It is in evidence.

The Court: If it is already in evidence, then how does it become material, counsel?

Mr. Merdes: There is no evidence at all from the defendants that they have or have not paid this tax, the income tax return. I mean, I want them to state. Sure, we stipulated that they haven't paid an income tax. They haven't paid an income tax, but I want him to state why they haven't paid it.

The Court: Oh, no, that would not be permitted, particularly since the witness has already stated that that is not his department, that he runs the boat. Objection will be sustained.

Mr. Merdes: No more.

The Court: Any redirect?

Mr. Detels: No redirect, your Honor.

(Testimony of Homer Kyros.)

The Court: That will be all Mr. Kyros.

Mr. Dimond: If the Court please—— [95]

The Court: Except this—it might be helpful if Mr. Kyros could be recalled for one question the Court would like to clarify for certain.

Whereupon Homer Kyros resumed the stand.

The Court: Mr. Kyros, although I have been many years in Alaska and am somewhat familiar with fishing operations, at least for the record could you explain further what the difference of processing would be between brine freezing and sharp freeze freezing?

A. I will be glad to. A sharp freezing is just a difference of types of refrigeration that you put the fish through to freeze them. We find with the blast or the sharp freezing we just put fish on a shelf, cool the whole room off with cold air and pulling the heat out of the fish to the coils, and that brings the fish down to any temperature that your plant can bring them down to. With brine freezing we have found for a fast, quick way of freezing a volume of fish, that we need in these kind of operations, we fill these tanks with water and bring the salinity up. We load the water with salt, melt it right into the water until we get it to around an 85 to 90 percentage salinity, and that way we have coils inside the tanks which is cooling this water with the brine, and with the salinity up to 85 or 90 the water will not freeze until it is around zero or two below zero, so we [96] circulate this brine over the—we load all the fish first of all into the

(Testimony of Homer Kyros.)

tank of brine and then have big pumps that circulate this brine, pull it off the bottom and spray it over the top and cooling this brine off and taking the heat off it at the same time; these coils in the brine at the same time is cooling the water; and eventually we get the fish down to the temperature of the brine which may be anywheres from ten above to twelve above.

The Court: Eventually then do you arrive at the same process, or is the brine frozen fish not frozen as hard?

A. Well, the temperature we take the fish out of the brine tank depends an awful lot on the volume of fish. If you are rushed, you take them out at a little higher temperature. If you are not rushed, you may take them out at five above, and likewise in shelf freezing, as I say, you do the same thing. I presume you would take them out at five above or zero or ten above, depending on how much you need the space to freeze the fish that you may have on hand.

The Court: Are you familiar also with freezing of salmon for the fresh fish market? Have you had experience with that sort of thing?

A. No, I haven't.

Mr. Merdes: What is that? [97]

The Court: The freezing of fish for the fresh frozen fish market.

A. That would be kings, I assume, or cohoes.

The Court: Kings or silvers or cohoes.

A. No, I haven't.

(Testimony of Homer Kyros.)

The Court: Do you know then whether or not your brine frozen fish have commercial value on the frozen fish market, other than for canning?

A. Well, I understand these kings that they freeze by brine are for the fresh market. They are frozen by brine.

The Court: Thank you. That opens up any further inquiry by counsel of course.

Q. (By Mr. Merdes): I just want to know—generally speaking, Mr. Kyros, the seine caught fish that are brine frozen and canned, that is your operation, is it not; they are brine frozen, taken to the States, and canned; an overwhelming number of your fish are frozen that way; is that correct; or are all your fish?

A. All my fish are brine frozen.

Q. And canned? A. Yes.

Mr. Merdes: That is all.

The Court: That is all, Mr. Kyros.

(Witness excused.)

Mr. Dimond: The defendants have no further evidence, your Honor. [98]

The Court: The defendants rest.

Mr. Merdes: At this time, your Honor, the Territory moves for a judgment, a judgment on the basis that the evidence introduced and the failure of the defendants to sustain the burden required by law and by numerous cases of the Supreme Court, which are stated on Page 6 through 10 in our trial brief, failure of the defendants to sustain

the burden to show that this classification is an arbitrary classification within a class.

The evidence, as clearly as crystal, has shown that these are two separate type of operations, that they are not in competition, that they freeze differently, that they freeze for different purposes, and, if there was ever a justification for a classification, this is it, and I can't conceive how under any state of the facts or any evidence introduced by the defendants wherein they have sustained the burden of proof required by the Supreme Court typical in 283 U. S. 537.

The Court: Well, as a matter of fact, the burden of proof is upon any party to sustain the affirmative of an issue.

Mr. Merdes: That is true, your Honor, but typically—in other words, our position is this. We presented our case and showed a taxing statute was presumed constitutional. We showed that the taxes were due and owing and unpaid. They come in and allege affirmative defenses and they haven't [99] sustained them. They haven't sustained their burden of proof showing this is an illegal, arbitrary, hostile classification within a class, and it is elementary, as the Court knows, that it is nothing but legalized discrimination if you can't justify a classification, and for that reason at this time before rebuttal, which we think is unnecessary, we would like to move for judgment on the basis of the evidence and lack of evidence in this case so far.

The Court: Well, the Court will reserve decision upon the motion for dismissal until the conclusion

of the case, pursuant to the rules. We cannot possibly determine that without a review of the stipulations of facts and review of the briefs submitted by the parties, but you may renew the motion of course at the time we have completed all the evidence.

Mr. Merdes: Well, it isn't a motion to dismiss, your Honor, because we filed the suit. It is a motion for judgment.

The Court: Yes; beg pardon; I mean the motion for judgment for the plaintiff upon the grounds of failure of defendants to sustain the burden of proof on their affirmative defenses. Such motion will be denied at this time with the privilege to renew it when all the evidence is in.

Mr. Merdes: At this time, your Honor, I would like to read the remainder of the depositions. Oh, [100] yes; pursuant to—oh, it is unnecessary. I presume by their reading our answer to their Interrogatory No. 10 it will be unnecessary to submit at this time our prior Exhibit 16 which counsel —we had agreed earlier on it, concerning the differences in operation between these two type of— between shore-based and floating cold storages. It was a breakdown of the answer to their Interrogatory 10, and we were going to submit it based upon the facts admitted and undisputed, but, since they read it in themselves as evidence and it is not controverted, I won't introduce it. But at this time I would like to read——

The Court: May I ask one question, counsel? As I stated a moment ago, I have not yet had an

opportunity to read these briefs, other than your preliminary brief. These admissions that we had the hearing on, as to the issues, what was done with that; I mean, is that all covered by the stipulations?

Mr. Merdes: You mean in the interrogatories, the answers to their interrogatories?

The Court: No. The admissions, the request for admissions with regard to the issues, your Interrogatory No. 5.

Mr. Merdes: That was the one you wrote your opinion on?

The Court: Yes.

Mr. Merdes: Well, let me tell you what happened, your Honor. [101]

The Court: Is that all incorporated in the stipulations?

Mr. Merdes: I will explain what happened. They narrowed the issues for me when they submitted their trial brief before trial. In other words, I agreed that they needn't—they had a direct answer to Question No. 5, as I understand it, which was a summarization of their brief, which is exactly what I wanted.

The Court: I see. So that their trial brief has been accepted by you as an answer to the question.

Mr. Merdes: In effect, your Honor. In other words, it really was of great assistance in the matter, complimenting Mr. Detels, and I wasn't aware of—there were many things that I wasn't aware of until I got it, so I want to tell the Court that

the opinion you wrote on that point was very well appreciated.

The Court: Well, before proceeding then with these depositions we will take a recess for ten minutes.

Whereupon Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore; whereupon the trial proceeded as follows:

Mr. Merdes: May it please the Court, I would like to read the balance of Mr. Parke's deposition.

Mr. Camerot: We will employ the same technique.

Whereupon Mr. Camerot resumed the witness [102] stand, and the

DEPOSITION OF THOMAS SIDNEY PARKE

was read as follows—questions by Mr. Merdes and answers by Mr. Camerot:

(Reading)

Q. What is your name?

A. Thomas Sidney Parke.

Q. And what is your profession and occupation?

A. I am a Special Deputy and Enforcement Officer for the Department of Taxation, Territory of Alaska.

Q. And how long have you worked in that capacity for the Territory? A. Since 1946.

Q. In that period of time with the Department, and possibly before, Mr. Parke, did you have occasion to familiarize yourself with the operations of floating freezer ships? A. I have.

(Deposition of Thomas Sidney Parke.)

Q. Now, Mr. Parke, reverting back to the original question concerning your experience and knowledge of freezer ship operations, will you very briefly describe this experience and whether or not you actually have been on board these ships and are you familiar with their operations, and if so, briefly describe your familiarity and your experience.

A. Well, these freezer ships—the first of our knowledge was about 1949, was the first that we had any indication of that type of freezing coming into the Territory. [103] Floating equipment before that time was made up of floating salteries and so forth, but at that time modern refrigeration came into effect and surplus Army boats were being purchased fairly cheap and that brought an influx of freezer ship operations, and this built up to a peak in 1952, the peak operation. All the operators began to think that that was the ideal way of putting up fish.

These operators have been operating for several years in Bristol Bay and I have been aboard several of them, in fact, practically all of them at sometime or other, and looking over their operation—how they, where they got their fish, how they processed them, how they froze them, how they stored them, and the time of the year they leave the area and the outcome of the fish in Seattle.

Q. Now, Mr. Parke, will you very briefly describe this operation and from the time they catch

(Deposition of Thomas Sidney Parke.)

the fish to the time they finish processing; very briefly.

A. The fish are caught by catcher boats that are either independent or company-owned, mostly company-owned boats. They are brought alongside the mother ship, which is anchored, and the fish are handed over into a large bag-type dip net, lifted up onto the deck and taken over this freezing compartment, which is a tank varying in size, averaging about twenty feet square and about ten [104] feet deep, filled with circulating salt water. They pump up salt water and then condense it with a salt to bring it to a heavy brine so that it won't freeze but still it will withstand the cold. These fish are lifted off the fishing boat, dropped into this tank of water and circulated around for from six to twelve hours, until the fish are frozen thoroughly, completely through. The salt brine is pumped out of that tank and the fish are picked out and stowed in a freezing compartment, dry freezing compartment, in the hold of the boat.

Q. Now, are these, Mr. Parke, fishermen who catch the fish for the mother ship, the ship that does the brine processing, these fishermen and boats —are they local fishermen?

A. Generally not. Practically all of them are non-resident fishermen. They come up from Seattle or they come up on the boat—the company gives them a choice of either coming up on the boat or flying up. There is a little difference in pay there,

(Deposition of Thomas Sidney Parke.)

whichever way, but they ship the boats up aboard the mother ship.

Q. Well, Mr. Parke, where do they catch these fish? You take for example the Bristol Bay operation, unless we otherwise specify. Now where are the salmon actually caught, physically, in relation to the shore?

A. Usually very close to the shore.

Q. Within how many yards or miles of the [105] shore or mean low tide, would you say?

A. Ordinarily your low tide is the drop-off—all the Bristol Bay area is practically made up of big rivers.

Q. I see.

A. And ordinarily there are cut banks in these rivers which are practically out of the water at low tide, and they fish along these cut banks, which is practically in the riverbed itself, and the whole bay is shallow, but the fishing is concentrated practically on the beach. It follows back and forth with the tide.

Q. So the catcher boats and the actual process of seining occurs very close to shore?

A. Yes.

Q. Now, when they get the fish, usually, in your experience, how far away is the mother ship anchored from the place where they catch them at the mean low tide? Does it vary from year to year, and if so, explain.

A. Yes, it does. It varies from day to day practically, as stormy weather they will move in up

(Deposition of Thomas Sidney Parke.)

the river and then you have your extreme tides, with the extreme tides they have to move out farther, and there are spots in the river a little deeper than others and if conditions are ideal, they will lie in there. If heavy winds are blowing they get in as close to shelter as they can. Their big problem is to make it as easy as possible for the fishermen [106] to discharge the fish.

Q. You say then, Mr. Parke, are these mother ships ever anchored out in the open ocean or are they always in a bay or a lagoon or off of a shore?

A. Well, it would be practically in the bay, Bristol Bay. According to Coast Guard and Fish and Wildlife regulations—they all control in Bristol Bay——

Q. I see.

Would you say then that most of the time, or what percentage of the time these mother ships, the ships to which the fish are brought by the seiners, where are they located in relation to shore? Could you make a general statement on that?

A. Ordinarily, if you will examine the chart of the Egegik or the Naknek area, you will find that the main channel runs along—three miles would be about mid-channel, right straight across——

Q. Three miles from where?

A. From the shore lines, after you get farther up the river it isn't that wide, and these boats will work from that in towards shore, or as close as they can possibly get.

Q. What percentage of the time would you say

(Deposition of Thomas Sidney Parke.)

these mother ships are within a line approximately three miles from shore, the mean low tide mark?

A. Practically all of the red season. They have to, in order to keep out of the way of their fishing boats, fishing vessels, and so on. They have to stay pretty much grouped up or back out of the way. In case of rough weather they try to get in, and in that case they are in the way, but ordinarily they stay pretty much in a group.

Q. All right, Mr. Parke. Now, Mr. Parke, have you ever had any difficulty in collecting taxes from these floating freezer ships? A. Yes, we have.

Q. As compared to land-based cold storages—will you explain for example, in the Bristol Bay area, what specific difficulties you have had with these freezer ships in your attempt to collect the taxes levied by Chapter 97 Session Laws of Alaska 1949, as amended—very briefly.

A. We have been very unsuccessful in collecting taxes from these floating operations. To date we have none of them, with the exception of a few very minor ones, that are up-to-date on any of their taxes.

Q. Now, Mr. Parke, do you have facts and figures available that would show the court the amount of taxes these defendants in this——

(Reading suspended)

Mr. Merdes: Excuse me. That can be stricken. I will skip that. That is covered by stipulation, [108] the amount of taxes.

The Court: Will you identify the page?

(Deposition of Thomas Sidney Parke.)

Mr. Merdes: On Page 7 commencing with Line 20 and going through Page 8, Page 9, Page 10, up to Line 24 on Page 11; that is omitted for the reason that the stipulation covers the amount of taxes. The question on Page 11, Lint 24.

(Reading resumed)

Q. Now, Mr. Parke, will you please summarize and state the total amount of taxes the defendants paid herein to the Territory of Alaska for the years 1949 through 1954?

A. The defendants paid a total of $8,929.99 to the Territory of Alaska.

Q. Now, will you state the total amount of taxes that they should have paid under the provisions of Chapter 97, SLA 1949 as amended?

A. They should have paid $119,925.79.

(Reading suspended)

Mr. Merdes: For the purposes of the record, that figure probably has been corrected by the stipulation, and we will be bound by the stipulation.

(Reading resumed)

Q. Now, Mr. Parke, in the collection of this almost nine thousand dollars for these four years, do you have the costs of collecting this amount of money? Could you tell the court what the cost was [109] to the Territory to collect this approximately nine thousand dollars from these freezer ship operators? A. Yes, we have.

Q. Mr. Parke, will you state what it cost you to collect this approximate nine thousand dollar in taxes?

(Deposition of Thomas Sidney Parke.)

A. Over and above routine office expenses, our grand total would amount to $11,657.34 to collect this tax.

(Reading suspended)

Mr. Dimond: If the Court please, I would like to move that the answer be stricken for the reason that Exhibit No. 12, where it showed the figure of $11,657.34 as suit expenditures, the Court sustained our motion to have that kept out of evidence on the grounds of relevancy, which is the very same figure which the Court ruled out earlier this morning. Exhibit No. 12 is an exhibit attached to the Plaintiff's Stipulation introduced at the beginning of the trial.

Mr. Merdes: Under the Federal Rules, your Honor, I am just curious, isn't that objection supposed to be taken at the time the deposition is taken?

The Court: Not necessarily. It is apparent that the figure given does include the item of cost of——

Mr. Merdes: Well, the entire figure wouldn't be stricken, only part of it.

The Court: ——bringing suit and expenses of the Attorney General's Office, and it is the same [110] figure that is used here. Therefore, that answer may be stricken.

Mr. Merdes: May it please the Court, part of that answer is an acceptable——

The Court: Well, we have that by stipulation to Exhibit 12. The answer may be stricken.

Mr. Merdes: I make the same offer of proof

(Deposition of Thomas Sidney Parke.)

now that I made before, that it is relevant and should be considered into evidence.

The Court: The offer will be denied.

Mr. Merdes: From now on, your Honor, for the purposes of the record, in view of the Court's ruling, we will consider his statements, all of the objections, and so forth, we will consider the Attorney General's expense item as excluded. Now, I offer this exhibit, for example, in connection with this, and the same objections and the same offer of proof will be made. Mr. Parke in the next question identified an exhibit which includes Attorney General's expenses.

The Court: Is that otherwise the same as covered——

Mr. Merdes: Yes, it is.

The Court: ——by the stipulation? Well, then it would seem unnecessary to offer it.

Mr. Merdes: Oh, no, your Honor. It includes the figures for '49 and '50, which are in addition to the ones in the stipulation.

Mr. Dimond: Have you offered that? [111]

Mr. Merdes: I am about ready to.

(Reading resumed).

Q. Mr. Parke, I would like to hand you an exhibit entitled Plaintiff's Exhibit No. 1, and will you state whether the facts and figures on here are accurate and true, and who prepared them.

A. These figures, to the best of our knowledge, are true and correct. They were prepared in our office from all possible data and information.

(Deposition of Thomas Sidney Parke.)

Q. So in summation, Mr. Parke, it cost the Territory of Alaska for the years involved to collect—it cost the Territory approximately eleven and a half thousand dollars to collect nine thousand dollars worth of taxes, over and above routine office expenses?

(Reading suspended)

Mr. Dimond: I will have to move to strike that. He hasn't answered it yet.

(Reading resumed)

A. That is right.

(Reading suspended)

Mr. Dimond: I object to the question.

Mr. Merdes: It would be the same.

The Court: Yes; it is the same thing.

Mr. Merdes: Yes. It is understood.

The Court: The objection to that question is [112] sustained, and the answer is stricken.

Mr. Merdes: Offer of proof. Now——

The Court: Understand, counsel, that the Court is not at all certain that we do not intend to finally rule that any expense of collection is a proper basis for this classification, and we reserve decision on that. Frankly, I do not know, until we have had a chance to review the whole question. That is one of the issues here to be determined.

Mr. Merdes: That is true, your Honor.

The Court: So that we are admitting all of this as relevant subject to the final decision of the Court as to whether that factor may be a proper basis of classification.

(Deposition of Thomas Sidney Parke.)

Mr. Merdes: I see. In other words, even the Attorney General's expenses are taken subject to further ruling.

The Court: No; no. That particular item I cannot see at all. It is the other expense.

Mr. Merdes: All right.

(Reading resumed)

Q. All right. Now, Mr. Parke, I hereby hand you Plaintiff's Exhibit No. 2, which is a statement of the general ratio of administrative expenses in collection and enforcement of Territorial taxes to Territorial revenue for the biennium '49 through '55, and other information pertaining to expenses, and I ask you to examine this exhibit. Will you please state where this information was received, [113] collected, from, and upon what it is based.

A. Yes. This information was collected within the Department of Taxation from all records and to the best of my knowledge is true and correct.

Mr. Merdes: I attach these two exhibits to the record, Exhibits 1 and 2.

(Reading suspended)

Mr. Merdes: And I offer them into evidence and subject to the same objection.

Mr. Dimond: Are you offering those into evidence now?

Mr. Merdes: Yes, I am.

Mr. Dimond: If the Court please, I would like to reserve my former objections on these matters as they appeared as Exhibits 12 and 13, but I also want to make a further objection. For example,

(Deposition of Thomas Sidney Parke.)

Exhibit 1, which plaintiff has just introduced in evidence, is the same as Exhibit No. 12 with one exception. It includes on the top part of the page expenses over and above routine office expenses in connection with the enforcement of the tax for 1949 and 1950, and I object to those inclusions for the reason that Mr. Parke testified on cross examination, which has been read here, that the expenditure of fifty dollars in 1949 and one hundred dollars in 1950 was not involved in the enforcement, collection, or attempted collection of this tax but was purely for investigative purposes. [114]

The Court: It would seem wholly improper, counsel, for the Court to admit the testimony of the witness upon cross examination in that respect and reject the direct.

Mr. Merdes: Yes.

The Court: That is wholly inconsistent. We cannot do any such thing. Therefore, your objection upon that ground must be overruled.

(Reading resumed)

Q. Now, Mr. Parke, to summarize this Exhibit 2, then, to point out certain highlights, what does it cost the Territory of Alaska to collect the tax from land-based cold storages——

(Reading suspended)

The Court: Well, just a minute. We haven't admitted these two exhibits yet, I believe, if you want to——

Mr. Merdes: I think I offered them and Mr. Dimond objected.

(Deposition of Thomas Sidney Parke.)

The Court: The exhibits may be admitted in evidence, except for the second section of Exhibit No. 1 which will be stricken.

Mr. Dimond: If the Court please, I don't want to burden the Court, but Exhibit No. 2, you did not purport to pass on the objection made by defendants to the 1954 figure of $5.37.

The Court: Yes; the same thing applies to that.

Mr. Dimond: I wanted to make my objection.

Clerk of Court: Plaintiff's Exhibit 1 will be No. 1 and Plaintiff's Exhibit 2 will be No. 2.

[Printer's Note: Plaintiff's Exhibit No. 1 is the same as Exhibit 12 set out at page 50; Exhibit No. 2 is the same as Exhibit No. 13 set out at page 51.]

Mr. Dimond: I am sorry to interrupt again, but, just to make the record clear, was that 1954 figure of $5.37 excluded this morning?

The Court: Yes.

Mr. Dimond: It was.

The Court: Yes.

Mr. Merdes: May we proceed on Page 13, Line 20?

(Reading resumed)

Q. Now, Mr. Parke, to summarize this Exhibit 2 then, to point out certain highlights, what does it cost the Territory of Alaska to collect the tax from land-based cold storages and other normal taxpayers, out of each dollar collected?

A. For the year 1949, or biennium 1949 to '51, it cost the Territory 3.30 cents on the dollar. In

(Deposition of Thomas Sidney Parke.)

1951 to '53 it dropped to 3.28 cents on the dollar, and in 1953 to '55 it is 3.10 on the dollar.

Q. May I ask you where these figures were gotten from, Mr. Parke?

A. From the official records of the Department of Taxation.

Q. Did the Department of Taxation submit a report, an official report? [116]

A. It comes from their annual report.

Q. I see. Now, in the year 1954 what did it cost —I'm sorry, in the year 1953, Mr. Parke, for example, what did it cost the Territory to collect the taxes from floating freezer ships and other floating cold storage equipment

A. It cost 44.73 cents on the dollar to collect.

Q. And in 1954 how much did it cost?

(Reading suspended)

Mr. Dimond: I will have to object to that.

The Court: That item we have stricken because it obviously includes the Attorney General's expense.

Mr. Merdes: All right. We make the same offer of proof. The question, reverting, going to Line 18 on Page 14.

(Reading resumed)

Q. Now, Mr. Parke, have you had any difficulty in securing facts and figures upon which to base a tax liability from the freezer ship operators?

A. We have had considerable difficulty.

Q. Have they filed their returns on time?

A. No. Very few are filed on time and figures

(Deposition of Thomas Sidney Parke.)

are not filed at all; what are filed are very inaccurate.

Q. Now, what about land-based cold storages—have you had experience in the office in dealing with their tax returns?

A. Yes, we have. [117]

Q. Now, based upon your experience, what do you have to state about the trouble you have collecting taxes from land-based cold storages?

A. We have practically no trouble. Their figures are usually found to be completely accurate and they run a solid, permanent installation that we can secure more figures from at any time, and they come in without any trouble whatsoever.

Q. Now, Mr. Parke, did you have occasion to have to serve some legal process on the defendants in this case, or other floating freezer ships?

A. Yes, I did.

Q. Did you have any difficulty in effecting process in serving these cases?

A. To some extent I did; yes,

Q. Would you explain what you did to effectuate service on these defendants in this case?

A. The big problem is transportation, getting to them and finding where they are. I had to charter planes and boats, get out in the rough sea, in order to get to the captain, who is the manager of the operation, to serve the papers.

Q. Now, Mr. Parke, did you have occasion to —you stated you had occasion and you were familiar with land-based cold storages. I would like

(Deposition of Thomas Sidney Parke.)

[118] to hand you Plaintiff's Exhibit 3, which is a statement of the receipts from land-based cold storages, and other fish processors derived from taxes other than those imposed by Chapter 97. Were you the person who prepared these figures, Mr. Parke? A. Principally, yes.

(Reading suspended)

Mr. Merdes: At this time I would like to introduce this into evidence.

Mr. Dimond: We would like to offer our objections to this for the same reason we objected to Exhibit No. 14.

Mr. Merdes: And you were overruled this morning.

Mr. Dimond: I want to reserve my objection.

The Court: Well, what did we finally decide as to No. 14—as I remember it, that we would not object for the time being but reserve decision on it.

Mr. Merdes: That is right.

The Court: I think—now, just a minute.

Mr. Merdes: That is my recollection.

Mr. Dimond: It is my recollection.

Mr. Merdes: It is both our recollections, your Honor.

The Court: No. Excuse me. That was 15. That was the matter of the allotment of funds for the fisheries. I think we did overrule the objection to No. 14 as some such comparison may be material and that, again, without finally deciding that issue, [119] for the same reason—let's see. Does this exhibit purport to show the same thing?

(Deposition of Thomas Sidney Parke.)

Mr. Dimond: I think this Exhibit 3 shows the same thing as Exhibit No. 14.

The Court: Well, it may be admitted then with the same ruling.

[Printer's Note: Plaintiff's Exhibit No. 3 is the same as Exhibit No. 14 set out at page 52.]

Mr. Merdes: We will continue on Page 16 commencing on Line 7.

(Reading resumed)

Q. Were you responsible for their preparation?

A. I am.

Q. Are these true and accurate, derived from the Department of Taxation?

A. They are; compiled from the records within the Department of Taxation.

Q. Very briefly, what do they show, Mr. Parke?

A. The amount of taxes paid by land-based cold storages and other fish processors.

Q. Do you know whether the floating—do you know from your own knowledge, Mr. Parke, whether floating cold storages, floating freezers, pay these taxes also? Or any one of them?

A. They should pay the first item, the corporation tax, if they are a corporation operating in the Territory. Property taxes are unnecessary, and the municipal tax in incorporated cities, they wouldn't [120] have to pay that, and the raw fish tax under Chapter 82, it would be unnecessary for them to pay that.

Q. Now, Mr. Parke, will you please state, based

(Deposition of Thomas Sidney Parke.)

upon the records in your office, the amount of taxes that are yet to be paid, the total amount for the years '49 through '54, that the land-based cold storages still owe the Territory, that is, unpaid taxes?

A. The land-based cold storages owe the Territory in unpaid taxes approximately $6,014.53.

Q. Now, will you please state the amount of taxes that they have actually paid to the Territory during the same years, '49 through '54?

A. They have actually paid the Territory $445,107.37.

Q. Now, Mr. Parke, will you state what the Tax Department records show concerning the punctuality, or whether or not the various defendants involved in this case have filed the tax returns required by law, starting from Arctic Maid.

A. Our records indicate the Arctic Maid in 1952, the return was filed late; the 1953 return was filed late; 1954 business license, fisheries license, was filed on time, on the deadline.

Q. Now what about the Alaska Reefer?

A. Alaska Reefer. '51 return was filed late; 1952 was filed late; 1953 was filed late; 1954 license [121] was secured on time. Pardon me, the return was filed on time.

Q. Pacific Reefer?

A. The Pacific Reefer didn't file at all in 1952; none in '53 and no license secured in '53 and filed on time in '54.

Q. All right. Pacific Queen?

A. They were late filing in '51; filed on time in

(Deposition of Thomas Sidney Parke.)

'52 and late in '53 and filed on time in '54.

The North Star filed late in '51; on time in '52; filed none at all in 1953 and were on time in '54.

American Packing Company didn't operate in '51; filed no return at all in '52——

Q. Were they operating in '52, do you know?

A. American Packing Company? Yes.

None in 1953 and filed on time in '54.

Q. Continue.

A. Northern Reefer didn't operate until 1954, and they filed late.

The Grimes Packing Company didn't operate in '52 and didn't file.

Q. The owner of the Grimes Packing Company died, didn't he? A. Yes.

Q. In what year, '53? A. In '54.

Q. All right. Now, Mr. Parke, will you please explain what tax, what would be the amount of tax [122] that a land-based cold storage operator or a cannery located in Alaska would pay if it caught one thousand, for example, one thousand red salmon and canned them in Alaska. Could you tell what they would pay and also tell what a floating freezer, what tax a floating freezer would pay to the Territory of Alaska on the identical one thousand red fish if they canned them outside of the Territory of Alaska?

(Reading suspended)

Mr. Dimond: Excuse me. If the Court please, I wonder if counsel would agree that question is what would be the amount of tax for a land-based

(Deposition of Thomas Sidney Parke.)

cold storage operator or a cannery pays. Do you agree that the answer——

Mr. Merdes: Yes, I agree.

Mr. Dimond: ——relates to a cannery?

Mr. Merdes: To a floating cannery.

Mr. Dimond: A cannery and not a cold storage operator. You have two.

Mr. Merdes: Yes. These taxes—I will agree that these taxes are what a land-based cannery or a floating cannery pays.

The Court: Your question relating to land-based cold storages may be stricken. You are referring here only to canneries.

Mr. Merdes: Yes; I am sorry. I think he explains that later. All right. [123]

(Reading resumed)

A. As I understand, you take a thousand raw fish——

Q. Raw fish.

A. A thousand sockeye, based on the 1954 average for Bristol Bay——

A. Would average 12.04 fish per case, that would make eighty-three cases of salmon.

Q. That is a thousand fish. In other words, you can eighty-three cases from a thousand fish?

A. Yes; and based on the 1954 raw fish computation under Chapter 82——

Q. SLA 1949?

A. SLA '49; would be computed to a tax of $63.69.

(Deposition of Thomas Sidney Parke.)

Q. Now, wait a minute—who would pay—sixty-three dollars and what?

A. $63.69 would be paid the Territory if it was canned in the Territory of Alaska.

Q. Now, if you took these same thousand fish, froze them in Alaska, then took them south and canned them, what tax would you pay to the Territory of Alaska?

A. Based on the prevailing price of seventy-seven cents per fish on the basis of four per cent would amount to a tax of $30.80. [124]

On what? On the entire amount or per case?

A. On the entire amount.

Q. And how much would the cannery pay if they did it in Alaska?

A. $63.69 on the same thousand fish.

Q. So it is more than double the tax if it is canned in the Territory? A. Yes.

Q. Do the freezer ships—within your knowledge, Mr. Parke—do these freezer ship operators have any property in the Territory against which the Territory can attach or seize in the event of non-payment of taxes?

A. To the best of my knowledge, they have none.

Q. Now, Mr. Parke, the Territory recently enacted a statute in the 1955 session of the Legislature which provided that all non-resident corporations who do not have—corporations, persons and partnerships—which do not have physical assets in the Territory must file a tax bond. Do you have any information, Mr. Parke, as to whether or not

(Deposition of Thomas Sidney Parke.)

these freezer ship operators have complied with that law, which became effective on June 1, 1955?

(Reading suspended)

Mr. Dimond: I would like to object, your Honor. I feel it involves a statute not related at all to the statutes under discussion here; furthermore, it involves 1955; and [125] secondly, or thirdly, it introduces extraneous issues into the case which, I think, are not relevant at all.

The Court: I find no—there is no provision in this act in question as to the type, is there?

Mr. Merdes: The Court can take it for what it is worth, but, as the Court knows, we have been showing that this is a pattern; see. They haven't been paying the income tax. I merely show this for what it is worth, to show that they don't comply with the law.

The Court: Well, I do not think it is worth anything for that purpose. The objection will be sustained.

Mr. Merdes: For the purposes of the record, I want to state the Territory's position, that we consider it relevant to show an over-all plan of noncompliance with Territorial law which would justify classification.

The Court: Well, how can you suggest, counsel, that the Territory in making this classification was going to anticipate that? The whole theory, as I see it, of your argument that the cost of collection is a proper basis or one of the bases for classification is that the Legislature anticipated such.

(Deposition of Thomas Sidney Parke.)

Mr. Merdes: Well, your Honor, obviously, I concede it, is self-evident that they didn't expect this specific thing. The only thing I can say is they expected trouble and they got it. [126]

The Court: Well, I think you go too far afield there.

Mr. Merdes: Well, I mean, the Court ruled. I accept the Court's ruling on it.

The Court: There is a question here, counsel. There is a question here. Either counsel may answer this. Chapter 82, as I understand it, has no application to fish taken for canning, that is, the raw fish, but the case tax then instead applies?

Mr. Merdes: It doesn't apply to freezer ships.

The Court: Well, in any event, to any cannery, for example.

Mr. Merdes: Yes; Chapter 8 applies to all canneries.

The Court: Beg pardon?

Mr. Merdes: Chapter 82 applies to all land-based canneries and floating canneries, Chapter 82 as amended. It is a raw fish tax, case tax.

The Court: Well, yes; case tax and the raw fish tax are in substance the same thing.

Mr. Merdes: Yes.

The Court: That is what I had in mind.

Mr. Merdes: Oh, I am sorry.

Mr. Detels: That does apply to canneries.

The Court: Then, it does apply to canneries.

Mr. Merdes: Yes. [127]

(Deposition of Thomas Sidney Parke.)

The Court: I thought you were talking about some other tax.

Mr. Merdes: No. Of course it applies.

The Court: Well, what in effect is the so-called raw fish tax is a substitution for the old case tax; is it not?

Mr. Merdes: You are right. That is right. Commencing on Line 6, Page 21.

(Reading resumed.)

Q. Now, do these freezer ship operators usually stay in one place, Mr. Parke? In other words, do you have easy accessibility with them when you want to get them?

A. No, decidedly not. They jump from one area to another—you don't know when they are coming or when they are leaving. They may be right in front of you at one time and the next day they may be gone. They stop in one of these bays and pick up their fish and are gone. They are very elusive.

Q. Now, Mr. Parke, when these freezer ship operate operate in Southeastern Alaska, do they operate exclusively within a line within three miles of mean low tide?

A. Yes, they do. In Southeastern Alaska they are always located in the small, narrow inlets.

Q. Do you know from your own personal knowledge whether these freezer ship operators employ local help in the processing of this fish?

A. To the best of my knowledge, they employ none. Occasionally there will be an extra man

(Deposition of Thomas Sidney Parke.)

picked up who may be a resident of Alaska, but ordinarily he signs on in Seattle.

Q. Do these freezer ship operators, to your knowledge, make local purchases of food, supplies and various sundry items of clothing and so forth for their crews?

A. No, there are very little purchases. According to the statement of facts, it shows none.

Q. Mr. Parke, do you have any difficulty with freezer ship operators and their crews insofar as the payment of the fishing license tax is concerned?

(Reading suspended.)

Mr. Dimond: If the Court please, I would like to object to that for the same reasons that I objected to the testimony on the bonding statute. It is irrelevant to the issues in this case and is another statute.

The Court: I fear so. It is going too far afield. Objection sustained. That is, the issue here, counsel, is not whether the freezer ships are bad boys but whether the classification is proper or is arbitrary.

Mr. Merdes: I skip, in view of the Court's suggestion, I mean the Court's ruling, I skip from Page 22, Line 6 on Page 22, through Page 23, through Line 11 on Page 24. Commencing now on Line 12 on Page 24.

(Reading resumed.) [129]

Q. Now, Mr. Parke, are you familiar with the land-based cold storage operations? A. I am.

Q. And you are familiar, you said you were

(Deposition of Thomas Sidney Parke.)

familiar, with freezer ship operations? Could you state the basic difference between the two types of operations—could you enumerate just briefly certain differences between the way they function and the structure and nature of the business of each?

A. I would say they were two different types of operations entirely. They can hardly be any comparison between them.

Q. Why? What do you base that on?

A. The freezer ship is an operation of securing the fish in the bulk and using the hold of the ship in the storage capacity as a raw product to hold them until they can get them to the cannery, or to the plant for processing.

Q. May I ask you, Mr. Parke, do you know whether or not they can them all, or do you know for a fact that they can them?

A. No, we don't.

Q. You are speculating?

A. According to information received, most of them are canned when they are received in the south, but we have no personal knowledge of what becomes of those fish once they are in the hold of the boat and taken out of Alaska— [130] that is the last we see of them.

Q. All right. The nature of the operation—why do you say it is different from cold storages—why is it?

A. Your cold storage is located on the shore and it is a permanent operation. They secure a better quality of fish as a whole. Their fish are generally

(Deposition of Thomas Sidney Parke.)

troll-caught fish, as far as the salmon are concerned, and they are handled in a much better manner and by the time they leave the cold storage for shipment outside, they are ready to go into the consumers' market.

Q. Would you say then, in view of the fact that they are troll-caught and so forth that the cost of production is higher then for land-based cold storages? A. It is much higher; yes.

(Reading suspended.)

Mr. Merdes: I guess it would be higher than freezer ship operations, rather than land based cold storages. I guess the question—I should have requested—the question probably meant higher than for freezer ship operations. Land-based operations are a higher cost. That was the conflict. Is it much higher?

Mr. Camarot: Yes.

Mr. Merdes: I am sorry. "Would you say then, in view of the fact"—well, you answered that question; didn't you? [131]

* * * * *

Q. And that is based upon what?

A. Well, the value of the fish is higher to begin with, the price of it, and then the cost of operation the whole way through, handling the fish, preserving them.

Q. All right. Mr. Parke, I would like to read you defendant's interrogatory number 10 to the plaintiff and it states as follows: "If there are any differences in the operation of freezer ships as

(Deposition of Thomas Sidney Parke.)

floating cold storages as opposed to shore-based cold storages which are claimed to support their separate classification for tax purposes, other than a difference in the cost of enforcement and collection, if any, state the distinctions relied upon." You may want to refer to Exhibit 19. This is in addition to the difference in enforcement and toughness to get them, and the cost of enforcement and collection—just what other differences.

A. The difference between a shore-based cold storage and a freezer ship, besides the cost of collection and the trouble of enforcement—they really can't be classed as the same type of operation. The shore-based cold storage is a permanent, practically a factory in the locality, supports a number of people and in places practically [132] supports the community entirely, gives local labor and supports the community as a whole, while the freezer ships are merely in the Territory for the duration of the season, which is very short, leave absolutely nothing, spends no money in the Territory, and nothing taxable, and leave no betterment so far as the Territory is concerned, none whatsoever.

Q. Is there anything else, Mr. Parke, that you would like to add?

A. Also the cold storages prepare their fish for the consumers' market and these are shipped out on commercial vessels, giving longshoremen work and the transportation companies a chance to make a living, which the Territory receives tax off of, while the freezer ships load their fish aboard the boat

(Deposition of Thomas Sidney Parke.)

and transport them themselves without any transportation paid whatsoever.

Q. Now, Mr. Parke, in relation to the tax imposed by Chapter 97, SLA '49, as amended in '51 and '55, the taxes applicable to freezer ships, the law states that an annual license tax equal to four per cent of the value of the raw halibut et cetera—and it goes on to say that the value of the raw material under this license shall be the actual price paid for the same, including indirect considerations, such as fuel, et cetera. And then it goes on to say such value shall apply to the raw material [133] herein mentioned which is for purely company-owned or subsidized boats operated by employees of the processer. Now, on the basis of that tax there, will you apply it to a typical freezer operation up in the Bristol Bay area—not giving facts and figures, but just a summation of how you can treat your tax.

A. The tax in the typical freezer ship operation, for instance in Bristol Bay would start out with the mother ship unloading the boats; they own those boats, the gear and when they supply them, put them in the water, they are supplied with food and fuel and all necessities, send them out on the grounds to catch the fish and bring them back and unload them to the boat. They pay the man a bonus, as they call it, on these fish, which is part of the price that they would pay an independent fisherman, and the cost of these fish can't be computed by the actual price paid.

(Deposition of Thomas Sidney Parke.)

Q. Briefly—— A. Yes. Your direct——

Q. Give an example, Mr. Parke. Just what factors do you take into consideration to base the tax upon? What is the base upon which the four per cent is applied?

A. Well, the four per cent is applied to the direct cost of the operation.

Q. Which includes—? [134]

A. That includes depreciation, insurance, repairs and maintenance on the boats, gas and oil and fish and fishermen's supplies.

Q. Is this a true statement then, that the actual cost of X amount of fish—say they get a hundred thousand fish in the operation, the actual cost of the fish is computed upon the cost of operation; isn't that correct?—including depreciation and other factors; right? A. Yes, sir.

Q. So if they get a hundred thousand fish and they estimate the cost, based upon the cost of the operation, is sixty cents a fish and they pay tax based upon four per cent; right? A. Yes.

Q. ——of the estimated value of the raw product. Now, on land-based cold storages, Mr. Parke, like the Juneau Cold Storage—how do they compute their tax?

A. It is computed on the number of dollars paid out for purchases of the fish. In other words, the fisherman brings the fish to the face of the dock and he has got a thousand fish, for example, at a dollar apiece. They pay him a thousand dollars and we get one per cent of that.

(Deposition of Thomas Sidney Parke.)

Q. Of a thousand dollars. Now, do they take into consideration indirect considerations?

A. No, they don't. That is reflected in the price they pay [135] the fishermen.

Q. Referring to Plaintiff's Exhibit 1, which is the one showing the expenditures by the Territory over and above routine office expenses made by the various departments for the collection and enforcement of taxes imposed upon freezer ships for the year '49 through '55, may I ask you, Mr. Parke, what information do you base these figures upon? Do you have a work sheet or do you keep a running record of these facts and figures?

A. Yes, we have a compiled work sheet showing where these figures were compiled, and some warrants in the office from travel expense accounts, et cetera.

Q. All right. Now, referring to Plaintiff's Exhibit No. 2, which is the general ratio of administrative expense of collection and enforcement of Territorial taxes to revenue, and so on, where did you get the facts and figures, what did you base those costs upon?

A. Upon figures compiled in our department and annual reports.

Q. Did you have a running work sheet or did you dovetail your facts and figures in Exhibit 1 to prepare Exhibit 2?

A. We have a work sheet.

Q. You have a current, every-day work sheet which you use as a basic source of information?

(Deposition of Thomas Sidney Parke.)

A. Yes, sir.

Q. And Exhibit No. 3, which is a statement of receipts from [136] land-based cold storages and other fish processors derived by the Territory from taxes other than those imposed by Chapter 97, where did you get those facts and figures?

A. From the [illegible]res compiled in our official records.

(Reading suspended.)

Mr. Merdes: This is cross examination on Page 31. Mr. Dimond read some of it. I would like to read the rest of it, commencing with Line 3.

(Reading resumed.)

Q. Mr. Parke, are you quite familiar with the operation of shore-based cold storages throughout the Territory of Alaska? A. I am.

Q. Do you know if any of them have their own company boats to catch fish with?

A. To the best of my knowledge, none of them do.

Q. I believe you stated on direct examination and explained the differences between floating and the land-based cold storages, that the cold storages prepare fish for the consumers' market; is that correct?

A. You say the cold storages do it?

Q. The land-based cold storages.

A. In a broad sense of the word I would say they do; yes.

Q. Isn't it true that some fish that are frozen in land-based cold storages are ultimately canned?

A. It is true to some extent. —

(Reading suspended.)

(Deposition of Thomas Sidney Parke.)

Mr. Dimond: This has been read.

Mr. Merdes: I understand that but I want to get it in context.

The Court: It will save time, I presume, to——

Mr. Merdes: To skip it? Sure; I will. All right. Mr. Dimond read then from on Page 31 from Line 17 through Line 15 on Page 32 and he ended on—now, I am commencing on Line 16, Page 32.

(Reading resumed.)

Q. And how about the Seldovia Cold Storage and Seldovia Bay Packing Company—is there such an operation up there?

A. There is an operation there. To the best of my knowledge they don't hold fish there at all in the Seldovia Cold Storage. That operation has been very small and more confined to the extent of halibut.

Q. You mean the Seldovia Bay Packing Company, as far as you know, does not use fish frozen by the Seldovia Cold Storage?

A. Not to my knowledge. It was just merely a hold-over, if they did.

Q. Do you have any knowledge that the Farwest Packing Company was using fish from the Wrangell Cold Storage?

A. I have never recalled of hearing of ever holding fish [138] there at all.

Q. How about the Sandpoint Cold Storage?

A. No, I have never heard of the holding—there are, however, the incidental fish. I would say what they do, they get—as it has been stated—they

(Deposition of Thomas Sidney Parke.)

always secure incidental fish; when a troller will bring in a load of kings and cohoes, he may catch a few pinks and so on which are not marketable, and they take those fish and they incidentally turn them over to a cold storage someplace, to get rid of them.

Q. Do you know whether or not there is a cold storage operated at Seldovia?

A. There was up to last year. I don't know whether they operated in 1955, without referring to records, but it has been a small operation there.

Q. How about Kayler-Dahl in Petersburg?

A. That is a fairly large operation.

Q. Cold storage operation?

A. They have a joint operation there. There is a cold storage and a cannery.

Q. I believe, Mr. Park, in Plaintiff's answer to defendant's interrogatory No. 1 of the interrogatories dated December, 1954, the answer shows the names of shore-based cold storages during the years 1949 through 1953 subject to Chapter 97, and in that list I don't see either the Seldovia Cold Storage or the Kayler-Dahl Cold Storage. [139] Can you explain why those two have not been included?

A. I would say, off-hand, it was an oversight. We have the Petersburg Cold Storage, and through an oversight we have left the Kayler-Dahl plant off.

Q. What I want to know is——

A. They pay considerable tax and they are in order, and pay a considerable amount of tax which should be——.

(Deposition of Thomas Sidney Parke.)

Q. Do you know if the Seldovia Cold Storage has paid taxes?

A. Yes, they have paid taxes. It is very minor, as far as the Seldovia Cold Storage is concerned. It doesn't amount to too much, but they have their tax all paid on it. It is an oversight that we left those off.

(Reading suspended.)

Mr. Merdes: Now, Mr. Dimond read from Line 16 on Page 34 through Line 24 on Page 35. I am commencing with Line 25 on Page 35.

(Reading resumed.)

Q. Are you familiar with the fact, Mr. Parke, that Halferty Canneries operate a cannery at Kodiak? A. Yes.

Q. You know of that cannery, don't you?

A. Yes, sir.

Q. And you know that that is a scow which is permanently tied to the shore, to a dock?

A. Not at Kodiak. [140]

Q. Do you know if there is any floating cannery operated at Kodiak? A. Yes, there is.

Q. Is that Halferty Cannery?

A. No, unless it is under an assumed name; it isn't under the "Halferty Cannery."

(Reading suspended.)

Mr. Merdes: I think Mr. Dimond read from Line 14 on Page 36, is that correct, through Line 21 on Page 39?

Mr. Dimond: That is correct.

(Deposition of Thomas Sidney Parke.)

Mr. Merdes: So I am commencing on Line 22, Page 39.

(Reading resumed.)

Q. Mr. Parke, the tax on land-based cold storages went into effect in 1949, did it not?

A. This type of——

Q. This one per cent tax? A. Yes.

Q. After that tax went into effect, for the years 1949 and 1950, didn't you have some expenditure over and above routine office expenses in collection of the tax from some shore-based cold storages?

A. Not too much. It was a help to all of the industry.

Q. You had to make some audits, did you not?—call at their offices or make inquiries?

A. Not too much, because they were paying a larger tax before [141] under a graduated scale tax, the old type of tax. Why, most of these cold storages were paying more tax then they do right now. This operation was a different type—this was a very easy tax to figure, so we didn't have more than routine inspections.

Q. Now on another subject, Mr. Parke, did you visit the offices of any of the defendants in 1953 and 1954?

A. I did; I should, I attempted to. I was in the office at eighty twenty D Street in Tacoma——

Q. Which defendant was that?

A. That is—I am not too sure—yes, it is at eight twenty D Street, Tacoma. That is the office of the Alaska Reefer and Pacific Reefer. In fact,

(Deposition of Thomas Sidney Parke.)

those companies are intermingled so much—I was also. I believe I made seven calls at George Hull's office, George Hull, who is the operator of the North Star.

Q. Did you inspect the books of any of these defendants? A. No.

Q. You didn't see any of the books?

A. I would go around and they would say the books aren't available, they aren't here. I also went to a bookkeeper's—a lady, if I can find her name——

Q. Did you ever tell any of the defendants or any of their agents or officers in this action that their vessels would be seized if they refused to pay the tax? [142] A. No, I never did.

Q. You are sure about that?

A. It is decidedly—I don't believe I would ever make a statement like that.

Q. You never threatened to seize a vessel?

A. No.

Mr. Merdes: For the purposes of the record, I want to object, because whether he threatened to seize the boat has no relevance to whether or not the four per cent tax should be levied.

(Reading suspended.)

Mr. Merdes: Well, I waive it.

The Court: It might relate to the lien, might it?

Mr. Merdes: Yes. Mr. Dimond explained that.

(Reading resumed.)

Mr. Dimond: Well, it has relevancy on the counterclaim. (Reading suspended.)

(Deposition of Thomas Sidney Parke.)

The Court: On the counterclaim.

Mr. Merdes: And then the question.

(Reading resumed.)

Q. Did you ever state to them in any form that if they disputed the liability, they should pay the tax and file a suit for refund?

A. Off-hand I can't remember saying it, but I probably did. [143] That is a common statement. If there is an argument there, the best way out is to pay it to save penalties and interest and get a refund if they have it coming.

Q. You advised them to do it?

A. I advised them to do it; yes.

Q. Did you tell them they had to pay it under protest?

A. I probably told them they were free to pay it under protest.

Q. Well, could you have just told them to pay it and then file suit for refund?

A. Not necessarily. I more likely would explain to them—the ordinary question is "what is my easiest way out?", and throughout tax questions—I can't recall saying that to anyone definitely—but through other tax matters, I usually tell them to try to pay it and if they want to, they can pay it under protest.

Q. What statement on this subject did you make to each of those defendants that you talked to or visited in Seattle in 1953 and 1954? Tell me exactly what you told them.

A. That is going to be very——

(Deposition of Thomas Sidney Parke.)

Q. I mean as far as these three things: as far as paying the taxes and filing a suit for refund; as far as the seizure of their vessels if they didn't pay. Tell me exactly what you said about these things.

A. As far as I know—we have this lady, she lived on, I [144] believe, on I Street; I went up to her apartment. She was taking care of the books for the Alaska Reefer—we can secure her name; it's in the files—and explained to her the full tax, how it worked and how they were to compute it and what she was to do about it, and also explained the fish licenses, the school tax, gear tax and so on. Their books were all at the time scattered someplace else. She didn't have them available at the time and the owners were in Peru, I believe it was, fishing, at the time. They were going to be gone two months, so I told her to write the Department and say I recommended an extension of thirty or sixty days to pay this tax; and I talked to two men in the office——

Q. Well, Mr. Parke, excuse me—I don't want all the details of your conversation with these people. I want to find out what you told each defendant with respect to two things: (1) the payment of taxes and suit for refund; (2) seizure of vessels. I want to just stick to those two things and tell me just exactly what you told each of the defendants on those two subjects.

(Reading suspended.)

Mr. Merdes: I waive my objection.

(Deposition of Thomas Sidney Parke.)

(Reading resumed.)

A. To the best of my knowledge and belief, I never mentioned a thing about seizing their vessel. We knew that that [145] would be a complete headache and it would be absurd to ever say anything like that, and as far as asking them about paying their taxes, I probably just inquired about what they were going to do about it and how we were going to compute it and what were the figures, and when we were going to secure our payment, a typical tax routine question.

Q. Just one more question, Mr. Parke. Didn't you testify it was general practice in cases like this to advise them that they could pay the tax and file suit for refund?

A. Yes, it was the general—how was that question again?

Reporter: "Didn't you testify it was general practice in cases like this to advise them that they could pay the tax and file suit for refund?"

A. Yes, it probably was. If there is a dispute—I can't definitely recall telling them that, but if there was a dispute over it, any tax problems, we tell them their best way out is to pay it and avoid penalties and interest, and any prosecution, and then wait and see the outcome, or file to get it back.

Q. Mr. Parke, how familiar are you with the operations of freezer ships?

A. Fairly familiar. I have been around them.

Q. How much have you been around them?

A. I have been aboard all of these ships. [146]

(Deposition of Thomas Sidney Parke.)

Q. How many times have you been aboard each one?

A. Some of them I have been aboard once or twice, and some of them many times.

Q. Now, didn't you testify that sometimes the mother ship would anchor at a point less than three miles seaward of mean low tide, or are they always more than three miles?

A. Sometimes they are less than that.

Q. How did you know that they were within the three-mile limit?

A. By landmarks and so on. We have flown over them and measured them, and then the location, general location. I believe they testified in places in their interrogatories that at times they have been within three miles.

(Reading suspended.)

Mr. Merdes: The next question pertains to the eleven-thousand-dollar item, which includes expenses for the Attorney General's Office, which the Court objected to, so——

The Court: That has been gone into pretty thoroughly.

Mr. Merdes: Yes.

The Court: You need not go into it further.

Mr. Merdes: No, I won't. So, I skip Line 13 through Line 23 on Page 45, and commencing now with Line 24, Page 45.

(Reading resumed.)

Q. Now, Mr. Parke, when you were relating in this deposition [147] about the difficulties you have

(Deposition of Thomas Sidney Parke.)

had with respect to a man named Breskovich, you are referring to the non-resident fishermen's license tax, are you not?

A. Robert Breskovich—in that case it was a non-resident fisherman's license, the gear tax and school tax and the operator's license for 19——

(Reading suspended.)

Mr. Dimond: I object——

Mr. Merdes: I consent to that being stricken.

The Court: Very well.

Mr. Merdes: Now, we are commencing again on Line 16, Page 46.

(Reading resumed.)

Q. Mr. Parke, the Arctic Maid, one of the defendants herein, states in its counterclaim that it paid $1,809.77 under protest to the Territory for the years 1952 and '53 for taxes imposed under Chapter 97 SLA '49 as amended. Now, do the records of your office, the official records of your office, show that this tax or the return or any indication whatever, that this tax was paid under protest?

A. They have no indication of it whatsoever.

Q. Do you have any correspondence—does the tax return itself on its face show that it was paid under protest? Do you have the tax return there?

A. I have the tax return. [148]

Q. Do you have it right here?

A. No; I will send for it.

(The tax return was sent for and received.)

Q. Did you receive any letters, Mr. Parke, from

(Deposition of Thomas Sidney Parke.)

Arctic Maid or any correspondence or notice whatsoever that the tax was paid under protest?

A. No, we have not.

Q. You have the tax returns right in front of you at this time? A. I have.

Q. Well, do they show anywhere on the face or on the back that they were paid under protest?

A. Nothing at all.

Q. All right. Now, going to Pacific Queen—their pleadings in their first counterclaim states that for the years 1951, '52 and '53 they paid $2,881.47 under protest to the Territory. Do you have the returns of the Pacific Queen in front of you at this time? A. I have.

Q. Now, do they show anywhere on the front or the back, a notation that the tax was paid under protest? A. Nothing on them at all.

Q. Do you have any correspondence or any notice whatsoever that this company paid their tax under protest? A. No, we haven't. [149]

Q. All right, Mr. Parke. Alaska Reefer, one of the defendants, states in this counterclaim that it paid $2,230.07 under protest. Do you have the Alaska Reefer returns in front of you, Mr. Parke?

A. I do.

Q. And do any one of those returns for the years shown, is there any statement that they paid under protest, any indication they were paid under protest?

A. None at all for '51, '52, '53; there is no indication whatsoever.

(Deposition of Thomas Sidney Parke.)

Q. You didn't receive any correspondence or any other notice whatsoever that they have paid their tax under protest?

A. No, we haven't. None at all.

Q. Now, Mr. Parke, concerning North Star, one of the defendants. In their counterclaim they allege that they paid $1,783.41 for the tax years 1951 and '52 and they paid them under protest. Do you have the original returns of North Star in front of you, Mr. Parke? A. I have.

Q. Will you please state whether or not there is any indication they were paid under protest.

A. No indication whatsoever.

Q. Have you received any other notice or correspondence that this company paid its taxes under protest? A. None at all. [150]

Q. Now, Mr. Parke, in reference to all these companies, these four I have just enumerated, have you had any indication that they ever filed these returns or have you received any notice from them that this was an overpayment through error?

A. No, we haven't.

Q. You have never received any correspondence or they have never indicated to you or said to you in any conversation that you have had with them—have they or have they not said this was an overpayment through error? A. No, they have not.

Q. They haven't.

At the time Mr. Dimond mentioned you had a conversation with some of the representatives of the defendants in Seattle, you stated to them that they

(Deposition of Thomas Sidney Parke.)

should pay the tax in order to avoid the payment of penalties and interest. Is that true, Mr. Parke?

A. To the best of my knowledge, it would be true.

Q. Do you recollect telling them whether they should pay it under protest or not?

A. I probably did. The usual procedure is, if there is any argument about it, to let them pay it under protest if they want to. Since that time we have not received any returns, so it hasn't been paid under protest.

(Reading suspended) [151]

Mr. Merdes: This is recross examination by Mr. Dimond on Page 50, commencing with Line 5.

(Reading resumed)

Q. Mr. Parke, were any of the taxes paid by these defendants in this action which they claimed to have been paid under protest in the answer to plaintiff's complaint, were they paid by checks or cash, or just how were they paid—do you know?

A. They were paid by check.

Q. Could the check have had a notation that it was paid under protest?

A. It could be possible.

Q. You don't recall? A. No.

(Reading suspended)

Mr. Merdes: Now, further direct by Mr. Merdes, commencing on Line 19, Page 50.

(Reading resumed)

Q. One final question, Mr. Parke: in Exhibit 1 you show the expenditures and so forth over and

(Deposition of Thomas Sidney Parke.)

above routine office expenditures made by all the departments in the Territory. As of what date are those figures computed?

A. To October 1 of 1955.

Q. Now, have you spent any time since October 1, 1955, that would augment these figures? Have you spent time on [152] freezer ship cases?

(Reading suspended)

Mr. Dimond: I object to that.

Mr. Merdes: This is not the Attorney General.

Mr. Dimond: Well, the time spent on this suit by the Tax Department I don't think is relevant to classification here.

Mr. Merdes: It certainly is a factor increasing the cost of collection, and, if the Tax Department has to spend all their time——

The Court: That factor must be something relating back to the time of the passage of the act; surely. No; I cannot see where that is material.

Mr. Merdes: Well, I would like to make an offer of proof at this time.

The Court: It is not necessary. You are making the offer in the deposition itself.

Mr. Merdes: Well, I want to get it in the record to show that——

The Court: Very well.

Mr. Merdes: On Page 51 of Tom Parke's deposition, Line 1——

The Court: The record may show that the objection to the question is sustained.

Mr. Merdes: On Page 50 from Line 19, [153]

(Deposition of Thomas Sidney Parke.)

through Page 51, Line 16 of Page 51. That is all the deposition.

The Court: It being understood—I do not have the deposition in front of me—that these questions relate to the expense of this suit?

Mr. Merdes: The Department of Taxation in connection with this suit.

(The following questions and answers, not previously read into the record, which are referred to above, are set out here in connection with the offer of proof made by plaintiff:)

A. Yes, we have spent practically all our time on it, or a considerable amount of time, anyway.

Q. Do you have any idea percentage-wise how much these figures would be increased? Between October 1 and today, what percentage of your time, your full time, have you devoted to freezer ship cases and preparation?

A. I would say at least seventy five per cent, of my time and of Mrs. Henning's.

Q. Your secretary? A. Yes.

Q. And what is your salary per month?

A. Six hundred a month.

Q. And Mrs. Henning's?

A. Four hundred and twenty five.

Q. Thank you.

(End of offer of proof) [154]

Mr. Merdes: At this time I would like to read the balance, I mean the balance of Mr. George's deposition. Mr. Dimond read part of it.

Whereupon Court recessed for ten minutes, re-

convening as per recess, with all parties present as heretofore, and the trial proceeded as follows:

Mr. Merdes: Mr. Dimond ended on Line 18, Page 2, of Mr. Wallis George's deposition, and so I will continue from Line 19.

DEPOSITION OF WALLIS GEORGE

Whereupon the deposition was read as follows—questions by Mr. Merdes and answers by Mr. Camarot:

(Reading)

Q. And during the operation, do you know the procedure through which fish are processed?

A. I believe I do.

Q. Will you very briefly give a narrative statement as to just what happens, Mr. George, from beginning to end, when a fish is brought in here and just what happens to it, how it is handled and until it ends up in the deep freeze.

A. Well, when fish arrive on our dock they are placed on a bidding board, where the various companies interested have opportunity to offer the fishermen the highest price possible. The highest bidder gets the fish. The next step is to get those fish unloaded and into our freezers. [155] They are lifted from the boat to a grading table; from there they go to the scales for weights; from there they are dropped in the floor and washed and placed through our sharp freezer. After frozen, they are

(Deposition of Wallis George.)

held in storage here until time of shipment, which in all probability is the following winter.

Q. Now, Mr. George, in this process of handling and so forth, do you immerse these fish in a salt brine at all, or do you freeze them directly from the tables?

A. No, we freeze directly from the tables into a sharp freezer, which has plates which they are laid on in the freezer. These rooms are brought down to a temperature of about thirty below. We have no brine freezer.

After coming out of the sharp freezer, they are then glazed, which means dumping the fish into a tank and immersing them about four or five times. From there they are taken to the storage room for permanent storage until the time of shipment.

Q. Now, Mr. George, you have been in this business, you say, for twenty seven years. During this period of time have you had occasion to acquire knowledge of the freezing processes that are used by floating freezer ships? Do you know how they operate, just basically or essentially?

A. Some floaters have the same type freezing we have here.

(Reading suspended) [156]

Mr. Merdes: I don't think this is too material because Mr. Dimond objected——

The Court: May I suggest, counsel, that, as to those parts that you do not especially wish to call to the attention of the Court, that as long as you wish to offer the remainder of the deposition, I can read

it at leisure and we need not take up court time, unless there are some parts you particularly wish to direct attention to, if there is no objection on the part of counsel. We have done that frequently in nonjury cases.

Mr. Merdes: As long as the Court assures me the Court will read the deposition.

The Court: I will certainly read it. I will suggest that at the moment I am not so impressed with the testimony offered, as indicated just now in Mr. George's deposition, of the differences in the manner of freezing. It strikes me that that is not too material. The issue here is the difference in the method of operation; one freezes for canning "Outside", and the other freezes for market. Now, as to how they are frozen, I can't conceive what difference that particularly would make because in the end the result is the same. As to how the fish are frozen—perhaps there is some difference with which I am not——

Mr. Merdes: Well, I am inclined to agree with your Honor. The fundamental difference is the method and purpose [157] of operation of different types of business, and I am merely illustrating these points just to show that there are minor differences in addition to that, but not as important I agree.

The Court: We will assure counsel then that we will read the balance of the Wallis George deposition. If there are any objections, however, to any of the questions that counsel for defendant wishes to urge, why, we could hear those at this time.

Mr. Dimond: I think I can stipulate that the deposition may be considered as having been read in evidence subject to objections which I can make right at this time, your Honor, for the record.

The Court: Yes.

Mr. Dimond: Starting on Page 5, Line 10, to Page 7, Line 5, Mr. George testifies as to other taxes which he pays the Territory of Alaska, such as Employment Security taxes and property taxes, and, even though the Court has ruled on this with respect to one of the exhibits, I will have to reiterate my objection to that evidence as not being relevant. Secondly——

The Court: The same ruling then as to the other testimony of a like character with reference to tax burden.

Mr. Dimond: The same objection to the questions and answers, Page 9, Line 21, to Page 10, Line 4.

Mr. Merdes: I will stipulate that anything relative to taxes is subject to the previous Court's ruling. I don't [158] think he has to go through it.

The Court: Very well. Your objection then, Mr. Dimond, may go to all of such evidence.

Mr. Dimond: Yes. Well, there is just one other thing, your Honor, and then we can stop. On Page 10, Mr. Merdes, Line 12, Mr. George says: "Well, the figures I have already given you include their payrolls as well as our own." If the Court will read the preceding questions, he will note that Mr. George has given figures of costs of operation and suddenly he discloses that he includes other persons

payrolls, and I think that I will have to object to all of the previous testimony because he has confused the issue and not just talked about his own operation.

The Court: Are there other persons' payrolls?

Mr. Dimond: He speaks about other fish buyers, like Mr. Engstrom and Mr. Johnson, who bring their fish into his plant for processing, and, apparently, he is testifying that his costs of operation include their payrolls in his cost of operation.

The Court: Their payrolls? You mean the price he pays them for the fish?

Mr. Dimond: No; the payrolls. Mr. George was telling what it cost to run the cold storage. He said he had to have so many employees and he paid them so much. He was talking about all his costs—taxes and payrolls and everything [159] else—and of course we object to those things not being relevant, and also we object to the answers to those questions because he discloses that he had included in his cost of operation payrolls of other persons.

The Court: Of other persons.

Mr. Merdes: Well, of course it is not denied that they are land-based cold storage operators, just as though if I had got another—I mean, these—Engstrom and the rest of them that he is talking about, the Court will learn from the context of the testimony, are people who bring fish in there and process them and pay the 1% tax on them.

The Court: These are the fish buyers?

Mr. Merdes: Yes; that is what they are.

The Court: Well, we will not consider as rele-

vant items as to payrolls of fish buyers who freeze fish in the cold storages.

Mr. Merdes: Well, the only thing I request the Court is to get the context of it. It is difficult for you to rule because you haven't been advised on this, and, if the Court will read that, I am sure that you can understand, and, if one is acceptable, if Mr. George's payroll is acceptable, the Court will see that the other one is identical. I mean, you can see that. I don't want to press the point.

The Court: Well, again, I do not think we have a right to consider the payroll of fish buyers aside from the [160] payroll of the Juneau Cold Storage Company.

Mr. Merdes: Well, it wasn't put in for that purpose. It was put in to show that the fish processed by fish buyers in that plant are processed exactly the way Mr. George's are processed.

The Court: Well, for that purpose it may be considered, as to show any comparison as to methods of processing, but not as to cost.

Mr. Merdes: All right, your Honor.

The following is the remainder of the

DEPOSITION OF WALLIS GEORGE

which was not previously read into the record. Those portions which were previously read by counsel for defendants are indicated by asterisks.

Q. Are you familiar with those using the brine process?

A. I have never had actual experience, but I have seen it in operation.

(Deposition of Wallis George.)

Q. You have seen them in operation, and could you briefly state what you saw regarding the manner in which they process fish.

A. Well, where I studied it pretty carefully was in Seattle on the San Juan Fishing and Packing Company's dock. The fish were cleaned, as we do, and then immersed in a brine of very low temperature and in that manner they are frozen.

Q. I see. All right, Mr. George, you are no doubt familiar [161] with the Territorial taxing statute, which is Chapter 97 Session Laws of Alaska 1949, as amended by Chapter 116 of '51 and 102 of '55. Well, to make it brief, Mr. George, are you aware of the fact that you, as a land-based cold storage operator, are subject to a one per cent tax on the raw product? A. I am.

Q. And do you also understand—if you don't, please advise me—that the same statute provides for a four per cent tax on the value of the raw products taken by floating freezer ships?

A. I understand that.

Q. With that background, Mr. George, I would like to ask you some questions concerning the operations of your business and any possible differences that may exist between your operation and their operation that would justify this difference in taxes, so with that in mind, I would like to ask you these questions:

Mr. George, as a land-based cold storage operator, what taxes are you liable to pay to the Territory of Alaska?

(Deposition of Wallis George.)

A. Well, our Employment Security tax alone for the last year was $5,567.19.

Q. May I ask you, Mr. George, this tax you pay pertains to your processing through freezing; is that correct? The [162] employment in your business here all pertains to the processing, freezing, of fish, and does not pertain to your fish market or any other part of your business, your Coca-Cola business?

A. You are right, and the figures I gave you just pertain to the fish operation only.

Q. Processing through freezing?

A. Right.

Q. All right. Now continue.

A. For fish processing, the Territory of Alaska received from us and through the other operators on our dock a total of $12,234.56.

Q. This is for what year? A. 1954.

Q. Would you consider 1954 a typical year; for example, would it be average as to the years between 1949 and '54? Would you say '54 was a typical year, regarding these expenses?

A. Yes; I would answer that "yes".

Q. All right. Continue then.

A. School tax, $195. I believe that is all the Territorial taxes.

Q. The taxes you enumerated are taxes you know you paid the Territory of Alaska. Is the tobacco tax you pay to the Territory of Alaska, does that have anything to do with [163] the fish processing business? A. No, not at all.

(Deposition of Wallis George.)

Q. Nothing at all. Now, Mr. George, will you please enumerate the taxes you as a permanent resident of this city and a businessman, would you please enumerate the taxes you pay to local municipalities and other taxing districts?

A. Our property tax to the City of Juneau amounts to $11,929 annually; that was for 1954. Our sales tax for the City of Juneau, $1,091.67. The reason the sales tax may seem small, fish which we process for others in the States is exempt from that tax.

Q. I get you.

A. I believe those are the only local city taxes.

Q. The property tax you pay to the City of Juneau, of course, includes taxes for the school district; is that not correct? A. That is right.

Q. Can you think of any other taxes you pay as a local land-based cold storage man that a floating freezer would not pay, even though you process fish for freezing—do you know personally?

Mr. Dimond: For the record, I want to show an objection to his knowledge of what floating freezer ships pay. I don't think he is qualified on that. [164]

A. Your question again, please?

Q. Do you know of any other taxes you pay, aside from these that a floating freezer would not pay?

A. The only tax I am familiar with is the one you mentioned at the beginning of this hearing, the one per cent processing against the four per cent processing.

(Deposition of Wallis George.)

Q. You mean you are both paying that—you are paying one and they are paying four?

A. Right.

Q. But you don't know of any of these other taxes? A. No.

Q. Now, is there anything else you want to add, Mr. George, concerning taxes or anything you pay to the local municipalities of the Territory that wasn't covered in the previous two questions?

A. From the tax standpoint I think we have covered it pretty well.

Q. I see.

A. We have other expenses, of course.

Q. All right, Mr. George, will you please enumerate other expenses you have incident to the processing of salmon through freezing that would reflect in your cost figures?

A. Well, yes. We have an expense here, longshore, for example, for the year 1954, which amounted to $22,360.70, paid for shipments going over our dock. [165]

Q. Of fish?

A. Of frozen fish. We have an electric power account here for power for the year 1954, paid the local power company $17,635.64.

Q. All in connection with freezing fish?

A. Right. We have a light, fuel and water expense for the year 1954 in the amount of $6,128.79. We have payrolls for the year 1954, paid our warehousemen, engineers, office force, $245,316.27. We have an expense here for maintaining our plant for

(Deposition of Wallis George.)

the year 1954 of $9,776.83. We spent on our dock repairs last year, aside from repairs and maintenance just mentioned, approximately $55,000. We contributed to charity—if you want that?

Q. Yes, we do.

A. $1,200. We purchased locally boxes for fish frozen in our plant and shipped out for 1954, $50,409.97 I believe that covers pretty much our operation expenses.

Q. Now, Mr. George, what about the value of your building and your premises here—do you have any figures or could you give us a rough estimate of what your plant here is worth?

A. Yes, I have those figures available. Property values and descriptions—we have three cold storage buildings. Our first unit, $132,542.74. Our second unit, which is a wood frame building—the first one I mentioned is concrete [166] —of $22,230.86. Our third concrete building cost a value of $386,940.24; the total value in buildings of $541,713.84. That gives us a storage capacity here of about nine million pounds.

Our dock and fish sheds, of $148,774.61. Machinery, cooler and equipment, $324,479.97. Furniture and fixtures, $26,306.88, for a total property valuation of $1,041,275.30.

Q. Now, Mr. George, is the Juneau Cold Storage Company a corporation?

A. The Juneau Cold Storage Company is a corporation.

(Deposition of Wallis George.)

Q. Do you pay corporation taxes to the Territory of Alaska? A. We do.

Q. Do you know the figures?

A. I haven't got those figures here; no.

Q. Would you have any idea of what a rough estimate of those taxes would be?

A. I estimate this to be around five thousand dollars.

Q. A year? A. Yes; for 1954.

Q. Now, Mr. George, Mr. Engstrom and Mr. Johnson, I understand, are fish buyers. Do they process or bring fish into your cold storage plant for processing?

A. They do. They use our facilities here.

Q. Could you estimate the volume of business they give or [167] how they contribute, through using your freezing [illegible]ess, in this town?

A. Well, the figures I have already given you include their payrolls as well as our own.

Q. I see. And did you want to add an additional factor about Mr. Engstrom and Mr. Johnson—you had mentioned this item here——

A. You mean what proportion of that amount they would pay?

Q. Does that include them also?

A. That includes their payrolls.

Q. No, I don't think it is necessary then. Now, Mr. George, the people whom you hire and the people who work on your dock and the people who sell you fish, are they or are they not local fishermen or local labor and local help?

(Deposition of Wallis George.)

A. They are all local help. As far as fishermen go, there are local fishermen as well as fishermen from other ports in Alaska, and fishermen from Canada and the States.

Q. Could you say proportionately what number of local fishermen, or Alaska fishermen — just roughly?

A. Oh, I would say probably we have a nucleus of twenty five local fishermen; that is, when I say "local" I mean Alaska — and oh, around twenty State-side and Canadian vessels.

Q. And the fish that Mr. Johnson and Mr. Engstrom process through here, is that included in those figures? [168]

A. That is included in those figures; yes.

Q. Now, Mr. George, has the Territory ever had occasion to sue you for processing fish taxes that you owed the Territory? A. They have not.

Q. Have you ever had any experience or any difficulties with the Territory of Alaska in their attempt to collect these taxes from you?

A. We have not.

Mr. Merdes: Let the record show that the direct examination is complete. Now, Mr. Dimond, you have the privilege of cross examination.

Cross Examination

Q. (By Mr. Dimond): Mr. George, you testified, did you not, that you purchased your fish from independent fishermen? A. That's right.

Q. Do you get all your fish from independent fishermen?

(Deposition of Wallis George.)

A. All our fish come from independent fishermen.

Q. The Juneau Cold Storage Company doesn't own any catcher boats itself then?

A. We have one boat, but we haven't used it as such.

Q. You have never used it to catch fish there?

A. No. [169]

Q. Are you familiar with the operation generally of other land-based cold storages in Alaska?

A. Yes, I have seen them all.

Q. Do you know whether any of the others have their own catcher boats?

A. None of them have; no.

Q. How do they get their fish then?

A. By the same as we do, by independent boats landing at their dock.

* * * * *

Q. Have you purchased other fish from independent fishermen as agent for others, like Stateside canneries?

A. No, we have not, not that I recall.

Q. But you say on one occasion you have purchased and frozen as much as a million——

A. A million and a half pounds.

Q. ——for a cannery? A. That's right.

Q. Within the past two years, for example, what percentage of your fish have been dressed and what percentage frozen in the round?

A. In the past two years practically all our fish have been frozen dressed, other than maybe a hun-

(Deposition of Wallis George.)

dred thousand pounds for bait purposes; they would be frozen round.

Q. And you pay a tax of one per cent on the fish frozen for [170] bait purposes?

A. Yes, we include that in our handling.

Q. What happens to the fish that are dressed, frozen and placed in boxes and shipped; what is the ultimate end of those fish?

A. Well, those fish will land up anywhere in the United States.

Q. As fresh frozen fish?

A. As fresh frozen fish.

Q. Is any of it canned at any place?

A. No, no; there is one possible exception, John. We may freeze as high as a hundred thousand pounds for one concern who are principally interested in troll dressed fish. In acquiring that quantity, we may have to take a few pinks, a few chums and a few reds, not to exceed two thousand pounds. These are shipped to Seattle and possibly canned; I don't know.

Q. How frequently do you do that?

A. That would be an annual—we are just closing out now for the present year. Vita Food are receiving fifteen hundred pounds only of that class of fish.

Q. Well, Mr. George, are you familiar with the market on canned salmon in the States, prices obtained?

A. I don't believe I could give you the present prices on canned salmon. [171]

(Deposition of Wallis George.)

Q. Do you know there is a premium of approximately a dollar a case in the case of red salmon?

A. There is a difference, yes.

Q. Would it be more advantageous to you to ship your salmon in the round to Seattle and have them canned economically?

A. I don't believe I can answer that. I am not familiar enough with——

* * * * *

Q. Mr. George, do you own or have an interest in a cannery in Juneau or nearby?

A. We have a hand-pack cannery; yes.

Q. Are any of the fish that are brought to your cold storage canned in that cannery?

A. They are. Seine-caught only, however, not troll.

Q. Now, on those fish that you can in your cannery, what tax do you pay with respect to those?

A. John, I don't know as I can answer that. This is our first year of operation. Our canned salmon department is being operated by Kayler-Dahl and ourselves—of Petersburg——

Q. But presumably you would pay taxes——

A. We would pay the regular taxes. They put it through their books, not ours.

Q. On those same fish would you pay the one per cent cold storage tax? [172]

A. No, we would not, I don't believe. My understanding of the cold storage tax is things go through our freezer.

Q. You operate this cannery in conjunction with

(Deposition of Wallis George.)

Kayler-Dahl Fish Company? A. That's right.

Q. And they keep the books on it?

A. That's right.

Q. Does Kayler-Dahl have a cold storage operation?

A. Kayler-Dahl has a cold storage in Petersburg; also operate a cannery in Petersburg.

Q. Mr. George, with respect to these taxes, you testified Juneau Cold Storage Company has paid—for example, the Employment Security tax of something over five thousand, that is a tax with respect to your employees, is it not?

A. That is a tax with respect to employers and employees, and employer's contributions, I believe.

Q. Yes, that is right. This year we employers pay a contribution.

Do all of those employees work in the work of processing fish through freezing?

A. Through freezing; yes.

Q. Do you have other activities in connection with the Juneau Cold Storage Company besides freezing fish?

A. Yes, we operate a bottling plant. [173]

Q. You didn't include the employees for that?

A. No, I didn't.

Q. You have a meat market also?

A. We have a meat market.

Q. That is not included? A. Right.

Q. How about the operation other than taxes—were those other activities, such as the meat market and the bottling plant, included with regard to your

(Deposition of Wallis George.)

expenses of running the Juneau Cold Storage Company?

A. No, the figures I have given you we have tried to keep apart from these other departments.

Q. These figures you gave me were related exclusively then to the fish processing operation?

A. Right.

Q. How do you compute the value of your raw fish for the purposes of taxation under the Territorial statute on the one per cent tax?

A. Well, it is one per cent of their purchased value.

Q. You just take the purchase value and take one per cent of that? A. Yes.

Q. You don't include in the value then indirect considerations, such as percentage of the cost of operating and maintaining the dock and so forth?

A. No.

Mr. Merdes: For the purposes of the record, I would like to object to this line of testimony, about how he computes his tax. I am sure that the law is clear on how this tax is computed, and I can't see where it is relevant to the direct examination.

Mr. Dimond: One other question on the same subject, which you may also object to, Mr. Merdes——

Q. I want to make this very clear, now: you pay a certain price to an independent fisherman for each fish that you buy and process through freezing, is that correct? A. That is right.

Q. And when you pay your tax, based upon one

(Deposition of Wallis George.)

per cent of the value, it is one per cent of the price that you pay the fisherman?

A. That is right. If there is a settlement with the fisherman of seventeen hundred dollars, we take one per cent of that as Territorial tax. I believe that is what the law calls for.

* * * * *

Q. How many employees do you have on the average for your fish processing business each year? Let's take '54 for example.

A. '54, we averaged fifty five male and eight female.

Q. They are engaged exclusively in the fish processing [175] business? A. Yes.

Q. Is that an average throughout the year?

A. No, that is the peak season.

Q. How long is your peak season?

A. About three months of the year. We have the average for the year, if you want it.

Q. Yes; could you give me the average for the year?

A. Yes. We have an average annual operation of about twenty five on our payrolls.

Q. Mr. George, one further question on this new operation, this cannery operation with Kayler-Dahl. Do you know how many fish that you purchased or go to the cannery, what the average is going to be or has been since you have been operating? In other words, I am trying to find out how many fish come over your dock would go to the cannery for canning purposes—just a rough figure.

(Deposition of Wallis George.)

A. Oh, I would say this year, which is our first year's experience in the canning end of it, that probably was fifty thousand pounds of seine fish.

Mr. Dimond: That is all I have.

Redirect Examination

Q. (By Mr. Merdes): Mr. George, on that same point about the percentage of [176] fish which you use that go across your dock and are canned, now are any of those fish frozen before they are canned or do you take them right down there?

A. They go fresh right into the cannery.

Q. That is what I thought. Now, Mr. George, you said you were familiar with the operation of other land-based cold storages in all of Alaska. Now, for the purposes of the record, would you state that the testimony you have given is a typical operation of all these cold storage plants, assuming they are the same volume and same size—it would be a proportionate cost and a proportionate breakdown of your operation; on the average?

A. I would say yes, our operations at all points are exactly the same.

Q. I see.

A. There are some cold storages of less capacity; naturally their overheads are a little less.

Q. Now, Mr. George, Mr. Dimond asked you what you based your processing tax on and you said one per cent of the value of the fish. Now, you don't have any catcher boats and you don't have company boats to catch these fish; is that correct?

A. That is correct. As I said before, we have one boat, but it has not been put to that use.

(Deposition of Wallis George.)

Q. You don't compute the cost of fuel and supplies, and you [177] don't compute those in as offsets, the gear, et cetera, because you don't furnish gear or anything of that sort——

Mr. Dimond: I object to the form of the question.

Mr. Merdes: I will rephrase the question, then.

Q. Mr. George, why don't you compute these offsets to gear and these indirect considerations?

A. Simply because we don't charter boats, have none of our own, and are not interested in that part of the operation.

* * * * *

Q. I see. Now, you are not positive, Mr. George, that this fish that you process is not canned in the States. Isn't it possible that some of these fish, this dressed, frozen fish, is canned? Do you know for a fact?

A. Well, I am positive that any troll fish is not canned in the States.

Q. What about the seine fish?

A. Seine fish could be canned in the States.

Q. Mr. George, in connection with your local cold storage business, do you provide services to fishermen and local people and if so, will you state what they are.

A. Well, we provide service to fishermen by maintaining inventories of ice and bait the year around. We offer gear lockers for the storage of their gear during the closed seasons, through our office here we make boat settlements for the fisher-

(Deposition of Wallis George.)

men, and assist them in all ways possible [178] with their business affairs.

Q. Is there any additional statement you want to make, Mr. George, concerning your fish processing business and the Territorial tax paid thereon, or any other statement you may desire to make concerning the processing tax you pay?

A. No, I think what we have gone over covers it pretty much completely.

Mr. Merdes: That is all of the redirect examination.

Recross Examination

Mr. Dimond: On recross examination I have two or three more questions.

Q. You may correct me, Mr. George, but my recollection is on direct examination you testified that either you, the Juneau Cold Storage Company here, or other land-based fish processors froze lots of fish in the round; do you recall that? That is, froze lots of fish that weren't dressed, but just froze them in the round.

A. I don't believe you have me quite right on that, John. Any time we would freeze fish in the round for canneries—and that occurred only when the run is so heavy that they can't take care of them in their own canning plants — is handled through us and during my experience here with the Juneau Cold Storage Company over a period of twenty [179] seven years, this has only happened two to three times.

* * * * *

(Deposition of Wallis George.)

Q. Now, one other question with respect to these independent fishermen: you say you buy all your fish from independent fishermen? A. Right.

Q. And you supply them with nothing in the way of gear, fuel or supplies?

A. We do not purchase any gear or fuel.

* * * * *

Mr. Merdes: Proceeding in the case, referring to our first set of interrogatories to the defendant, dated 13 January '55, there are certain—I would like to read at this time Interrogatories Nos. 4, 5 and 6 and the defendants' answers. Now, I will read Interrogatory 4.

The Court: That is interrogatories propounded by the plaintiff?

Mr. Merdes: To the defendant. No. 4.

Mr. Dimond: Which set is that?

Mr. Merdes: This is the first set, our first set to you, dated 13 January '55.

Mr. Dimond: Numbers what? [180]

Mr. Merdes: This is No. 4. The question is: "State the number, or poundage, of Red or Sockeye Salmon from the above totals which were canned for each of the years 1949 through 1954. State the gross receipts received from sale of said canned Red or Sockeye Salmon."

Now, if counsel will stipulate that those answers can be read—I mean, the Court—those answers can be considered in the record, I will waive reading them. It merely shows your process, your entire operation was canning. Is that all right?

Mr. Detels: We so stipulate.

Mr. Dimond: Yes.

Mr. Merdes: All right. Now, then No. 5——

The Court: There is no dispute upon that point is there?

Mr. Merdes: No.

(The following is the Answer to Interrogatory No. 4: "All red salmon listed in answer to 3 above were canned in the year obtained.")

Mr. Merdes: I will read Question No. 5: "State the number, or poundage, of Red and/or Sockeye Salmon which were placed on the fresh-frozen, or other than canned, market for each of the years 1949 through 1954."

All the answers are "None," except "500 pounds" in the Alaska Reefer case. [181]

And Interrogatory No. 6: "State the number, or poundage, by species, of all other types of salmon which were canned, and the gross receipts therefrom, for each of the years 1949 through 1954."

And I wish counsel would so stipulate, the same way as they stipulated to No. 4. Will you stipulate that the answers may be considered into the record the same as you did for Interrogatory No. 4? It is just for different salmon, other than sockeye.

Mr. Detels: No. 5 or No. 6?

Mr. Merdes: No. I already read No. 5. No. 6 is the same as 4 except that it is salmon other than sockeye.

Mr. Detels: That is agreeable.

(The following is the Answer to Interroga-

tory No. 6: "All other salmon listed in answer to 3 above were canned in the year obtained.")

Mr. Merdes: And Interrogatory No. 7: "State the number, or poundage, by species, of all other types of salmon that were sold frozen or by methods other than canning and the gross receipts therefrom for each of the years 1949 through 1954."

Will you stipulate that your answer may be read into the record?

Mr. Dimond: Yes.

(The following is the Answer to Interrogatory No. 7: "None.") [182]

Mr. Merdes: Incidentally, your Honor, all the answers to these stipulations are in the Court's files.

The Court: Very well. If there is no objection, the Court will consider in evidence all of the answers to the interrogatories.

Mr. Merdes: It is all right with me. Now, your Honor, at this time, in the event that the Court takes into consideration the plaintiff's—the defendants' objections as to the validity of the Department of Fisheries, Mr. Dimond and myself have stipulated that the affidavit of Frank W. Hynes, who is the fisheries supervisor for the Department of Fisheries, and the affidavit of Edward S. Marvich, who is the chief biologist, senior biologist, in the Territorial Department of Fisheries, can be considered into evidence as the testimony they would give if *there* were under oath here today.

The Court: May we hear from you just a little further now on that point, counsel.

Mr. Merdes: Well, your Honor——

The Court: Wherein could there be any difference, with regard to the classification, between these two types of operations, so far as the cost of the Department of Fisheries is concerned? That is not clear to me at all.

Mr. Merdes: Well, the answer is this. In one of their interrogatories they asked us what the Territory of Alaska has expended on canned commercial salmon conservation. [183] Obviously, they thought it relevant or they never would have asked it. Now, we answered the question, and our answer showed that we spent in excess of a million dollars directly and indirectly for the conservation of commercial salmon, of our commercial salmon fisheries. Now, defendant, as you noticed or may have heard in opening argument, in his statement said that the Territory cannot spend any money for conservation of salmon. Now, I merely submit this evidence to explain to the Court and to show the Court the consent of the United States to take this money, the actual cooperation of the United States and the Territory of Alaska to expend money for conservation. That was the reason for it. We don't consider their objections well taken at all, but just in the event the Court does.

The Court: I did not understand Mr. Dimond's objection to be that the Territory cannot spend money for conservation. I understood his point to be that they cannot spend money for enforcement of regulations of the Fish and Wildlife Service. Was that not your point?

Mr. Dimond: No, your Honor. I submit the Territory cannot spend money for conservation too, in addition.

The Court: Oh, very well. Therefore, it is an issue.

Mr. Merdes: Yes, it is.

Mr. Dimond: I stipulate, your Honor, this may be [184] admitted subject to defendants' objection that it is entirely irrelevant to the issues in this case.

The Court: Well, yes; and here again, suppose there is an issue, wherein would there be any difference in the two classes of operations? The other things you point to, counsel, are different. But where would there be any difference?

Mr. Merdes: Well, your Honor, it is really an argumentative question, and, familiarity with Toomer v. Witsell and Mullaney v. Anderson and understanding those premises and those cases which so stated that conservation is an element that can justify a classification, we submit it for that reason.

The Court: Well, we think this, that your point is well-taken, that it would justify a tax upon the fishing industry or the taking of fish or the processing of fish, but where would it justify a difference in the classification between these two operations? Well, again, I will not finally decide that until we read the cases to which you refer, but I am still at a loss to see where it is material, but I will read those cases first, and we will still reserve decision in the matter.

Mr. Merdes: What exhibit number did you give the last exhibit?

Clerk of Court: The last was Plaintiff's Exhibit No. 3. [185]

Mr. Merdes: Exhibit No. 4 will be the affidavit of Frank W. Hynes, copies of which defendants have, and the next exhibit will be No. 5 and will be the affidavit of Edward S. Marvich, which can be considered into evidence.

The Court: These affidavits then may be admitted for the purpose as stated. Would you give the names again—the affidavits of——

Clerk of Court: Of Frank W. Hynes will be Plaintiff's Exhibit No. 4, and the affidavit of Edward S. Marvich will be Plaintiff's Exhibit No. 5.

PLAINTIFF'S EXHIBIT No. 4

[Title of District Court and Causes Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7142-A, 7143-A, and 7129-A]

AFFIDAVIT OF FRANK W. HYNES

United States of America
Territory of Alaska—ss.

I, Frank W. Hynes, being first duly sworn on oath, depose and state: That I am and have been for the past seven (7) years, a Fisheries Supervisor for the Federal Fish and Wildlife Service, Juneau, Alaska, and as such I have had occasion to become familiar with the Service's cooperation with the Alaska Department of Fisheries. I have personal knowledge of the joint program we have with the

Alaska Department of Fisheries and I am fully aware of the details thereof.

Since the creation of the Alaska Department of Fisheries by the 1949 Territorial Legislature, that Department has made important financial contributions to the stream improvement and law enforcement programs of the Fish and Wildlife Service, paying the salaries of as many as twenty-five seasonal stream inspectors as well as bearing a large part of the expense of major stream improvement projects such as the Falls Creek fish ladder. The Department also maintained field laboratories for the study of fishery problems in connection with the king and red salmon runs of the Taku River and Pauls Bight, Afognak Island.

Other program of the Department which have contributed to the management of the Alaska commercial fisheries are harbor seal control on the Copper, Taku and Stikine Rivers; black cod investigations; king salmon tagging experiments; and annual stream surveys to determine the extent of spawning escapements of salmon.

To the best of my knowledge and belief personal and working relationships between the Alaska Department of Fisheries and the Fish and Wildlife Service has been very satisfactory. I consider the contribution of money and personnel by the Alaska Department of Fisheries to the salmon conservation program in Alaska to be of great value. The Fish and Wildlife Service freely consents to and at times has requested the assistance of the Alaska Department of Fisheries in the Federal Govern-

ment's attempt to operate a healthy salmon conservation program in Alaska.

Dated at Juneau, Alaska this 4th day of November, 1955.

/s/ FRANK W. HYNES
Fisheries Supervisor
Fish and Wildlife Service

Subscribed and Sworn To before me this 4th day of November, 1955.

[Seal] /s/ MARJORY WENTWORTH
Notary Public in and for Alaska. My Commission expires: June 17, 1959.

Received in Evidence November 8, 1955.

PLAINTIFF'S EXHIBIT No. 5

[Title of District Court and Causes Nos. 7093-A, 7130-A, 7131-A, 7132-A, 7142-A, 7143-A, and 7129-A]

AFFIDAVIT OF EDWARD S. MARVICH

United States of America
Territory of Alaska—ss.

I, Edward S. Marvich, being first duly sworn on oath, depose and state: That I am a Senior Biologist with the Alaska Department of Fisheries, an agency of the Territorial Government, employed for the past four and one-half years and as such I have had occasion in the course of my official duties to become familiar with the monies expended and the

programs inaugurated by the Alaska Department of Fisheries for the conservation and propogation of Alaska's commercial fisheries, working at all times in cooperation with the United States Fish and Wildlife Service.

The Alaska Department of Fisheries was created by an Act of the Territorial Legislature, Chapter 68 of the Sessions Laws of Alaska 1949. Chapter 68 specifically instructs the Alaska Department of Fisheries to cooperate with the United States Fish and Wildlife Service. Following are excerpts taken from Chapter 68, Sessions Laws, of Alaska 1949:

"Section 1. Department of Fisheries: Purposes. There is hereby created a Department of Fisheries, to be known as the Alaska Department of Fisheries, to carry out the following purposes.

(c) To cooperate with the United States Fish and Wildlife Service.

"Section 6. Powers of the Director. The Director shall be the executive officer of the Board and such is authorized to employ personnel necessary to carry out the work of the Board at Salaries authorized by the Board, make purchases and enter into contracts and agreements with the United States Fish and Wildlife Service and cooperative effort in carrying out the purposes of this act, and to transact all other necessary business of the Board.

"Section 7. Power and Duties of the Board.

(a) The Board shall have the power to determine and promulgate reasonable rules and regulations governing all persons engaged in the business of catching fish in the Territorial waters of Alaska;

provided, however, that such rules and regulations shall not be in derogation of restrictions imposed by the United States Fish and Wildlife Service, but constitute additional safeguards for preservation and improvement of Alaska's fisheries.

(b) The Board shall have the power to police the fisheries on its own initiative or in cooperation with the United States Fish and Wildlife Services, and shall have the power to enforce it regulations.

(c) In furtherance of its broader purposes, the Board may engage in stream clearance, hatchery and re-stocking projects and biological studies, alone or in collaboration with the United States Fish and Wildlife Service."

The Alaska Department of Fisheries and the Alaska Fisheries Board have carried out the cited provisions of Chapter 68, Sessions Laws of Alaska 1949. While there has been no direct transfer of Territorial money to the Federal Government, the Alaska Department of Fisheries has, since its inception in 1949, assisted the United States Fish and Wildlife Service by providing manpower, equipment and supplies—all of which were paid with Territorial funds.

The assistance given the United States Fish and Wildlife Service has included the salaries of personnel paid from Territorial monies, but instructed and supervised in their duties as seasonal stream guards and fisheries inspectors by the United States Fish and Wildlife Service. The Federal agency worked the men; the Territory paid the bill. Following is a breakdown of the number of men paid

out of Alaska Department of Fisheries funds and utilized by the United States Fish and Wildlife Service as seasonal stream guards and fisheries inspectors during the past seven years:

Year	No. of Men	Assigned Location
1949	19	S.E. Alaska, Prince William Sound, Kodiak, Copper River Flats, Copper River, U. S. Fish and Wildlife Service weir at Katlan River.
1950	14	S.E. Alaska, Kodiak, Cook Inlet, Copper River, Prince William Sound.
1951	18	S.E. Alaska, Prince William Sound, Cook Inlet, Copper River.
1952	25	S.E. Alaska, Yakutat, Copper River, Prince William Sound, Cook Inlet, Kodiak.
1953	12	S.E. Alaska, Kodiak, Copper River, Prince William Sound, Kenai Peninsula.
1954	12	S.E. Alaska, Kodiak, Kenai, Copper River.
1955	5	Kodiak, Copper River, Kenai.

The importance of the assistance rendered by the Alaska Department of Fisheries to the staff of the United States Fish and Wildlife Service can be readily appreciated when one considers that the Territory in 1952 provided approximately one-half

the total number of seasonal stream guards for the protection of Alaska's great commercial resource—the salmon.

In addition to the personnel provided, the Territory, through the Alaska Department of Fisheries, has provided construction workers, lumber, cement, steel, sand, gravel, blasting powder, blasting caps, rented barges, and other miscellaneous supplies and services at the express request of the United States Fish and Wildlife Service. These materials and services have been used by the Federal agency for work on stream improvement, to the advantage of the salmon stocks of Alaska.

Due to budgetary limitations, the complexity of Alaska's salmon fisheries and the many problems associated with Alaska's salmon, the United States Fish and Wildlife Service has been unable to undertake the basic research necessary for the proper management of many of Alaska's salmon fisheries. The Territory, therefore, agreed with the United States Fish and Wildlife Service to take over the primary research for the troll fishery with the following objectives: (1) to discover the present condition of the Alaska troll fishery resources in relation to past production; (2) to establish the component parts being supplied by Alaskan streams and from streams in other geographical areas; (3) to establish the degree that Alaska streams contribute to the catches of British Columbia, Washington, Oregon and California fisheries; and (4) to investigate the possibility of increasing the production in Alaskan waters. The findings of the Alaska Depart-

ment of Fisheries are published in the Annual Reports of the Department. Briefly, the data show that the Alaska offshore king salmon troll fishery is largely dependent upon stock originating from outside Territorial waters, mainly British Columbia, Washington and Oregon. The offshore silver salmon fishery of Alaska, conversely, is largely dependent upon spawning streams in inside Alaskan waters. Such basic research findings augment the research program of the United States Fish and Wildlife Service and provide basic data that can be intelligently applied to provide for the maximum sustained yield of one of Alaska's important salmon fisheries. Attached is a copy of a letter from Mr. Clarence J. Rhode, Regional Director of Alaska for the United States Fish and Wildlife Service, addressed to Mr. J. P. Valentine, Territorial Fisheries Board. This letter is submitted as evidence of the cooperation between the Alaska Department of Fisheries and the United States Fish and Wildlife Service.

I could go on at great lengths citing additional examples of assistance rendered to the United States Fish and Wildlife Service by the Territory for the protection, preservation and rehabilitation of Alaska's salmon fisheries. These include efforts in salmon predator control, biological research, watershed management, inspection and construction of fishways.

A breakdown of the past and present budgets of Alaska Department of Fisheries is herewith sub-

mitted to illustrate the portions of the budget allocated for work on commerical fisheries.

Territory of Alaska
Alaska Department of Fisheries Appropriations

Alaska Biennium	Total	Sport Fish	Percentage of Sport Fish	Total Appropriation Commercial Fisheries
1949-1951	$ 167,500.00	$ none	0	100%
1951-1953	459.672.00	50,000.00	10.9	89.1
1953-1955	510,402.00	90,000.00	17.6	82.4
1955-1957	672,790.00	95,000.00	14.1	85.9
	$1,810,364.00	$225,000.00		

Dated at Juneau, Alaska, this 4th day of November, 1955.

/s/ EDWARD S. MARVICH
Senior Biologist, Alaska Department of Fisheries

Subscribed and Sworn to before me this 4th day of November, 1955.

[Seal] /s/ GERTRUDE E. NAYLOR
Notary Public in and for Alaska. My Commission expires: 7/20/57.

(Copy)

Department of the Interior
Fish and Wildlife Service
Office of Regional Director
Juneau, Alaska
March 30, 1949

Mr. J. P. Valentine
Territorial Fisheries Board
Ketchikan, Alaska
Dear Mr. Valentine:

This is in furtherance of our recent conversation

on the subject of co-operative fisheries management activities to be carried out between your organization and the Fish and Wildlife Service.

I am outlining a number of projects which I believe to be in line with your own thinking and that of your fellow Fisheries Board members as to the best means of using our joint facilities for the development and conservation of the Alaska fisheries.

1. Stream Watchmen:

It is an accepted fact that the salmon runs in most of the major districts are now at a dangerously low level and must be managed with the utmost wisdom if they are to be brought back to their former state of abundance. No better means to accomplish this objective has ever been devised than to protect the spawning grounds. Honest, alert stream watchmen can do a great deal to insure good escapements, as has been demonstrated time and again. A fair number of watchmen with good skiffs and motors, coupled with the intensive aerial and surface patrol we will be able to maintain for the duration of the short fishing season this year would see us a long way on the road toward rehabilitation of the runs.

Appropriations for the fiscal year 1950, as approved by the Bureau of the Budget and passed by the House Sub-Committee, will permit the employment of about eighty stream watchmen for approximately three months. This number is not enough to do the job. In southeastern Alaska alone there are more than a thousand spawning streams, and at least one in ten should have a watchman. We

realize, of course, that our combined appropriations would not be enough to give such coverage. If the Fisheries Board will provide funds to hire and outfit twenty additional men, I am convinced that Alaska will be repaid a thousand-fold on the investment. This would require approximately $25,000 for wages, camp equipment, skiffs and outboard motors. Fish and Wildlife Service vessels and aircraft would, of course, furnish transportation to and from the duty stations and provide service and supervision throughout the season.

2. Salmon tagging and downstream migrant counts:

These are two semi-scientific phases of fishery management that have long been known to provide the most accurate data on migration routes, and basic information upon which to predicate forecasts of the abundance of future runs.

The Fish and Wildlife Service and its predecessor agency, the Bureau of Fisheries, pioneered this field in Alaska, and for more than a quarter of a century data obtained by salmon tagging has been the foundation upon which regulatory measures have been built. Downstream migrant counts do not have quite the historical background of tagging, but even on the small scale our funds have permitted carrying them on, their value has been thoroughly demonstrated. The experiments made at Little Port Walter during the last eight years have shown a remarkable correlation between the data obtained there on fresh water and salt water

survival of the salmon, and the actual volume of the runs elsewhere in southeastern Alaska.

On the basis of the proven value of tagging and migrant counts, the suggestion is made that you give serious consideration to financing a moderate program encompassing these and closely allied work such as stream surveys.

A small seaworthy vessel of the seiner or halibut type, manned by four men who would perform the dual service of vessel operation and field work could be chartered for about $1,000. a month. For crew, equipment and stores, $1,200. to $1,400. a month would be needed, or a total of approximately $2,500. a month. Operations should be carried on from the start of the downstream migrant of pink salmon, about April 15, until September 30 or October 15, depending upon the time spawning has ended. A total outlay of $20,000 would be a fair cost estimate, allowing a reasonable reserve balance which could be withdrawn or made available for continuation of the program.

3. Stream Improvement:

Many of our most important spawning streams are blocked by waterfalls, long-jams, beaver dams and barrier composed of debris and rock, as well as man-made devices to impound water or trap fish. This year we will have two crews working in southeastern Alaska on this phase of fishery management. Funds are available only for limited operation, however, and your participation is solicited in whatever degree you believe to be justified. Vast sums could be used to good advantage, as the field is

practically limitless, and I am convinced that any investment, large or small, would be more than repaid by the increased salmon runs.

4. Stream pollution and logging studies:

With the introduction of pulp mills into southeastern Alaska in the near future almost an established fact, we are faced with the problem of controlling waste disposal and regulating logging operations to protect the fisheries. Already steps have been taken by the Legislature in placing an excellent water pollution law in the statutes; by the Forest Service in laying out timber sales in such a manner as to give the best protection to the salmon streams and imposing strict regulations upon the disposal of logging debris, and by the Health Department on the handling of sewage and other toxic materials. There is still much to be accomplished, however, before we can be certain that our fisheries will not suffer by reason of this new industry. Other states where pulp mills have operated have found too late that pulp production and fisheries are not compatible unless every safety precaution is taken before the damage is done.

I think your participation in these studies, financial and otherwise, is of vital importance, and I urge you to be in readiness to answer a call for assistance when it appears expedient to solicit your aid. At present I can give you no estimate of costs involved. Further studies by trained scientists are needed before we have the complete picture.

We will look forward to your participation in annual fishery hearings, seasonal meetings to de-

termine if fisheries operations shall be extended or curtailed, and generally to having the benefit of your advice and counsel on the many problems involved in managing our great fishery resources.

We should plan on a meeting in Juneau before long to work out the details of our coming season's operations. In the meantime, we shall be glad to have your ideas on the proposals set forth here.

Yours very truly,

/Sgd./ CLARENCE J. RHODE
Regional Director

cc: Rothwell
Brunstad
Wakefield
Walton

Admitted in Evidence Nov. 8, 1955.

Mr. Merdes: The Territory has no more rebuttal, your Honor.

The Court: Now, do we any surrebuttal?

Mr. Detels: If your Honor please, we would like to have Mr. Kyros take the stand for a very limited purpose. Unless the cross examination is extended, it should not take more than a minute or two.

The Court: Very well.

HOMER KYROS

called as a witness on behalf of the defendants, having previously been duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Detels): Mr. Kyros, did you hear

(Testimony of Homer Kyros.)

the testimony that was read into this record concerning the statements of Mr. Parke of [186] the Department of Taxation with respect to the difficulty of locating and establishing contact with the freezer ships? A. Yes, I did.

Q. Can you state whether there in any requirement imposed by any governmental authority on freezer ships to submit reports or data as to their proposed movements and operations?

A. Well, there is a Fish and Wildlife, the United States Fish and Wildlife has a ruling which makes all the freezers, and every other operator for that matter, submit to them before the season their intentions to operate, at which time you send a letter to them telling them where you intend to operate with which boat and in Bristol Bay how many boats you will be using, also designating the color and numbers and identifying them as your catcher boats.

Q. And does that include a designation of the period, the dates within which you propose to operate?

A. Yes, it does. You tell them the Bristol Bay season, which periods are understood in the Fish and Wildlife regulations. At the same time you tell them any other area you intend to operate.

Q. By "other area," you mean Southeastern?

A. Southeastern, Kodiak, or Cook Inlet, whatever it may be.

Q. Now, is that information available to anyone from the [187] Fish and Wildlife Service?

A. Well, it goes to the Fish and Wildlife Serv-

(Testimony of Homer Kyros.)

ice. I don't know but I should think it would be available.

Mr. Merdes: Your Honor, I don't think he can testify as to whether or not that that would be available; he can't testify in answer because he hasn't indicated what his knowledge of the Fish and Wildlife operation is, whether that would be available or not.

The Court: Well, his testimony is that it goes to the Fish and Wildlife Service.

Mr. Merdes: The question, as I understand it, is, is it available.

The Court: You may cross-examine on it, counsel. He testified positively that the reports go to the Service.

Q. (By Mr. Detels): All right. Now, has Mr. Parke had occasion to come aboard the Arctic Maid?

A. Yes, he did. He came aboard in the 1953 Bristol Bay season.

Q. How did he reach the Arctic Maid, if you know?

A. Well, one of my tenders told me that he was on shore and he would like to come aboard, so I told him to let him get aboard and bring him out, which he did.

Mr. Detels: I have no further questions. [188]

Cross Examination

Q. (By Mr. Merdes): This information about your operations, are you required to report that to the Territorial Tax Department or any agency of the Territory?

(Testimony of Homer Kyros.)

A. Not to my knowledge.

Q. Not to your knowledge. Now——

The Court: Mr. Kyros, do you not likewise—are you not likewise required to report to the Fish and Wildlife the total number of salmon taken?

A. Yes, we do, and we do submit them.

The Court: Those figures you do submit; but of course that has nothing to do with revenue, just simply the number of fish taken, not your——

A. Also the revenue is included in the number of fish in the reports.

The Court: Oh, the amount paid for the fish?

A. Yes.

The Court: Oh, so it is. In your reports to the Fish and Wildlife you show the number of fish taken and the amount paid for the fish?

A. Well, I can't go into that too deeply, but, in dollars, a figure in dollars is submitted to the Fish and Wildlife. What that constitutes I am not in a position to say, as I am not too familiar with that aspect of our business. [189]

Q. (By Mr. Merdes): As you stated before, you are not the bookkeeper? A. I am not; no.

The Court: Counsel, isn't that shown in the deposition of Mr. Parke?

Mr. Merdes: What is that?

The Court: What is Mr. Parke's official position? Is he under the Fish and Wildlife?

Mr. Merdes: Oh, no. Mr. Parke is——

The Court: No; I am thinking of another; not Mr. Parke. An exhibit here states—may I look at

(Testimony of Homer Kyros.)

the exhibits? No; I beg your pardon. I am thinking of Donald McKernan.

Mr. Merdes: He is fisheries supervisor.

The Court: He is the supervisor, not Mr. Parke. I am sorry. This photostatic copy of a letter from Donald McKernan, the Office of Regional Director, Juneau, appears to be attached to Plaintiff's Request for Admissions and Genuineness of Documents. Are they not then before the Court?

Mr. Merdes: Well, if the Court desires to consider them, I would offer them into evidence, because they are official reports of the Fish and Wildlife Service and they may be helpful in arriving at your decision, and for that reason I would like to offer those Requests for Admissions into evidence.

The Court: These figures are, as I understand them, [190] they are—the comparative figures as to value are reduced to standard cases?

Mr. Merdes: That is right.

Mr. Dimond: If the Court please, we have no objection, except that there are certain discrepancies in one of Mr. McKernan's exhibits as to the number of fish caught by the defendants.

The Court: Well, we are not considering, counsel, the figures but the fact of whether or not these figures are reported to the Regional Director and whether or not those figures then are available to the Tax Commissioner.

Mr. Merdes: Oh, may it please the Court, these figures are not available to the public, and we had to get them by subpoena.

(Testimony of Homer Kyros.)

The Court: Not the public; but are they available to the Tax Commissioner?

Mr. Merdes: No, they are not available to the Tax Commissioner. We had to get a court subpoena to get it.

The Court: They are published, are they not?

Mr. Merdes: No, they are not published; not the names; certainly the totals are published; but not the names of these defendants are not published.

Mr. Dimond: Mr. McKernan told me I could get the totals and all the names of all the ships and the totals caught by all, but, as far as the individual Arctic Maid [191] catching so many fish, he said I would have to have a subpoena. The Tax Commissioner has the power of subpoena, doesn't he?

Mr. Merdes: In other words, there is no way for them to check whether these figures are true. They just take what they are given.

The Court: Well, yes.

Mr. Merdes: But in our stipulation we used them on the basis of the tax. See, our stipulation—the reason they weren't offered earlier was because counsel agreed and settled the figures and determined, based on those and the cost of fishing statement they submitted in answer to interrogatories, just what the ultimate tax was, and that is the only purpose of getting those figures.

The Court: You can assure the Court then, counsel that these figures are not available to the Territory and Tax Commissioner except by subpoena?

Mr. Merdes: That is absolutely true. I was so told by Mr. Baltzo and Mr. McKernan.

The Court: I will look into that. Are there any further questions then to Mr. Kyros?

Mr. Merdes: I have no further questions.

(Witness excused.)

Mr. Detels: I would like to make one remark in order to clarify the record. Mr. Merdes has introduced in evidence our answers to Interrogatories Nos. 4, 5, 6 and 7. [192] The Court when it reads the answers will learn that those questions were not answered in their entirety as written. Certain information was requested with respect to the gross receipts for which the Territory, in lieu of which, substituted subsequent interrogatories.

Mr. Merdes: You mean the supplemental interrogatories?

Mr. Detels: That is correct. The request of these interrogatories, in so far as it related to receipts by the defendants was deleted by agreement, so that the record may be clear. Is that——

Mr. Merdes: I take your word for it, counsel. I don't specifically remember it.

The Court: That is No. 7?

Mr. Detels: That is covered in Nos. 4, 6 and 7.

The Court: Oh.

Mr. Merdes: And there were supplemental—we don't want to get too involved—but there were supplemental interrogatories filed as to the amount that was taxed, and they are indicated by answers to plaintiff's supplemental interrogatories in the

Pacific Queen case and North Star case and Arctic Maid—no—North Star—that is about it.

The Court: There is nothing further then in the way of surrebuttal?

Mr. Dimond: Nothing further, your Honor. [193]

* * * * *

The Court: I might suggest this, that my present feeling is that I would particularly like to hear from counsel on this issue of possible discrimination. To me that at [194] present seems the most important issue here. I am not so much impressed with the defense relating to violation of the commerce clause, or, rather, as to interference with interstate commerce. That doesn't—hardly appears to me to be at issue here from the evidence. But, as to the question of whether there is a just basis for the classification by the Legislature of a 1% tax on one operation and a 4% on the other, I should like to hear from counsel especially on that issue. To me that is probably the meat of the coconut, although of course the other issues will likewise be considered carefully by the Court, so that you might bear that in mind in presenting arguments in the morning.

Whereupon the trial was adjourned until 10:00 o'clock a.m., November 9, 1955, reconvening as per adjournment, with all parties present as heretofore; whereupon the trial proceeded as follows:

The Court: We will resume the trial then at this time in the case of the Territory of Alaska v. Arctic Maid and associated cases. Before pro-

ceeding with the argument of counsel, there is one matter which we had reserved decision upon yesterday, one in which I should like to announce a decision, having since had an opportunity to review the trial briefs submitted by counsel and the stipulations, and that is the matter of the admissibility of Exhibit No. 15 attached to the stipulation between the parties, one on which objection [195] was made as to its materiality, the particular exhibit relating to the allotment of funds and expenditures to the Alaska Department of Fisheries.

Now, it is understood that this exhibit is offered in connection with the question of whether or not the Court may consider the matter of Territorial expenditures for the conservation and propagation of fisheries to which the defendants do not otherwise contribute by taxation in considering the matter of the validity of the license tax.

I have in mind definitely that there are two issues of control as to this matter. One is whether or not the defendants may be taxed at all on the issues raised as to the Territorial limits of the Legislature as to control of the fishing or any other business beyond the three-mile limit, and the matter of the alleged violation of the commerce clause, and the matter of the alleged violation of the White Act. Then there is also the question of whether or not, if they may be taxed, such tax is arbitrary, discriminatory, or whether the classification made by the Legislature is justifiable and valid.

In considering the matter yesterday I had partic-

ularly in mind the second question, the question of whether or not there is such a discrimination as would violate the equal protection clause of the Fourteenth Amendment to the Constitution. I was rather doubtful whether this particular exhibit [196] would have any bearing upon that issue. However, if it does not, certainly it would have a bearing upon the present issue. Therefore, I feel that it is material.

In this connection, however, the Court cannot entertain and will not pass upon the question raised by the defendants in their memorandum re admissibility of evidence, challenging the validity of the act of the Legislature creating the Territorial Fisheries Department and also challenging the validity of the appropriations made by the Legislature for such department, for the reason that I feel that such issue is wholly collateral, is not germane to the issues here involved nor necessary to the determination of the only question before the Court, and that is the admissibility of this evidence, that for the Court to attempt to pass upon such an important question purely on the matter of a ruling of the admissibility of evidence would be purest dicta and would not be effective in any manner. Therefore, the Court will not pass upon this question, although we do appreciate the labor to which counsel for defendants have gone in reviewing the subject.

I believe that that is the only matter in which we had reserved decision, except the motion of the

plaintiff for judgment, and I did reserve the right for you to renew that motion.

Mr. Merdes: Well, of course—— [197]

The Court: At the close of the evidence—which I presume you do?

Mr. Merdes: Yes.

Mr. Camerot: If the Court please, before the Court closes the case completely in so far as the evidence is concerned, counsel and I have discussed one additional stipulation which we would appreciate the Court recognizing and permitting to enter into evidence at this time.

The Court: Yes.

Mr. Camerot: The stipulation concerns the question of whether or not the Territory has a lien that follows personal property, to-wit, a boat that was originally owned by the taxpayer and subsequently sold to an innocent purchaser, and the stipulation is as follows: that the vessel Reefer II was transferred from the estate of O. L. Grimes, the taxpayer, to the Northern Reefer Company, the innocent purchaser, sometime after February 1, 1953.

Mr. Dimond: Is so stipulate.

Mr. Camerot: Thank you, if the Court please.

The Court: On the motion then of the plaintiff for judgment, the Court feels that there is a substantial dispute both in fact and in law with regard to the issue of the proper classification made by the Legislature, which can be determined best upon final decision in the case on its merits, and for that reason the motion for judgment will be denied.

Mr. Merdes: It is my understanding that in the denial of the motion for a judgment the Court is not concluding that no basis exists for classification but you feel that the problem is so important that you want to hear closing argument to clarify certain issues because of dispute of facts and law involved?

The Court: Well, substantially that. We feel that there is sufficient evidence and sufficient questions of law so that the matter should be decided not upon your motion but upon the final decision of the case. We make no decision at this time as to whether or not there is a proper classification. We simply hold that there is a sufficient dispute, such that the matter will be determined upon final decision of the case. [199]

* * * * *

Mr. Merdes: May it please the Court, in conversation with counsel prior to the Court's coming into session I expressed the hope that in view of the manner in which the trial was conducted, in other words, stipulation as to the tax liability and the fact that there was no question that these taxes were due if the act is valid, and then the burden of proof being on the defendants to establish their affirmative defense, and which they attempted to do, and then the rebuttal, it was informally decided, and counsel may want to be heard, that they should proceed first to argue on their burden of proof, and then the Territory will answer in rebuttal, in the same manner in which we handled the trial, and so, if the Court has no objection and counsel has no

objection, I think that would be the proper and logical way to proceed, because the Territory has sustained its burden on its complaint because the taxes are due and it was stipulated that that is all true. They have five affirmative defenses in which they attempt to show that the classes are so similar that there can't be any classification and which they should argue first, and then we will answer. If the Court has no objection, that is the way we will proceed.

The Court: If there be no objection, I think that [200] may be proper.

Now, then by your leave, the defense will make the first argument here upon the theory that we are proceeding here now only on the affirmative defenses in which they have the burden. Then I presume that the defense would be allowed rebuttal.

Mr. Merdes: No, your Honor, because, as I see it, we filed the lawsuit; we had the burden of proof as the moving party to prove that the taxes were due and owing and so forth. Everything is presumed valid on the taxes. Now, on their affirmative defenses and counterclaims they are like plaintiffs. They have the burden, and the law is clear they have the burden, in which case, if you want to hear them in rebuttal, I mean, I wouldn't have any objection.

The Court: Very well. We will not confuse the issues here. We will consider that the plaintiff has waived the opening argument.

Mr. Merdes: As far as the establishment of the

owing and the collection of the taxes, which is all stipulated.

The Court: Very well. I would like to state too, before you get in this, we are very appreciative of the extensive trial briefs that have been submitted by the parties, which are exceedingly helpful, and for that reason, possibly, the arguments need not cover all of the points submitted in the briefs, except, of course, such matters as you particularly [201] urge, but all of it will be considered. Indeed, it is a pleasure to find such exhaustive work submitted by the counsel in the case, which is exceedingly helpful.

* * * * *

[Endorsed]: Filed August 27, 1956.

[fol. 377]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Fee & Hamley, Circuit Judges, and Solomon, District Judge.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 13, 1958

Ordered appeals herein argued by Mr. Martin P. Detels, Jr. and Mr. M. Bayard Crutcher, counsel for the Appellants, and by Mr. J. Gerald Williams, Attorney General, Territory of Alaska, counsel for the Appellee, and submitted to the Court for consideration and decision.

[fol. 378]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—March 16, 1959

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 379] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15283-4-5-6-7-8

ARCTIC MAID, etc., et al., Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

ORDER GRANTING PETITION FOR REHEARING
—Filed November 9, 1959

Before: Hamley, Circuit Judge, and Solomon, District Judge.

The petition for rehearing filed on behalf of the appellants in Docket Nos. 15283, 15284, 15285, 15286, and 15287 herein is granted.

The Court on its own motion grants a rehearing in Docket No. 15288 herein.

Frederick G. Hamley, Circuit Judge, Gus J. Solomon, District Judge.

[fol. 380] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15283-4-5-6-7-8

[Title omitted]

ORDER CALENDARING REHEARING EN BANC
—Filed November 13, 1959

Before: Chambers, Stephens, Pope, Barnes, Hamley, Hamlin, Jertberg, Merrill, and Koelsch, Circuit Judges.

Judges Hamley and Solomon (DJ), a majority of the court consisting of Judges Fee, Hamley, and Solomon, as originally constituted to hear and determine the above entitled cases, having granted a rehearing therein, and having informed the Chief Judge that in their opinion the cases should be reheard en banc, and the Chief Judge having convened the active judges of the court for the purpose of considering such request, and a majority of the active judges having determined that the cases should be reheard en banc, Now, Therefore, pursuant to Rule 23, Rules of the United States Court of Appeals for the Ninth Circuit,

It is Ordered that the above-entitled causes be calendared for rehearing en banc.

Richard H. Chambers, Albert Lee Stephens, Walter L. Pope, Stanley N. Barnes, Frederick G. Hamley, Oliver D. Hamlin, Charles M. Merrill, M. Oliver Koelsch, Gilbert H. Jertberg, Circuit Judges.

[fol. 381]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Stephens, Pope, Barnes, Hamley, Hamlin, Jertberg, Merrill & Koelsch, Circuit Judges.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION —December 7, 1959

Ordered appeals herein argued by Mr. Martin P. Detels, Jr., and Mr. M. Bayard Crutcher, counsel for the Appellants, and by Mr. Gary Thurlow and Mr. Donald Gregg, Assistant Attorneys General, State of Alaska, counsel for the Appellee, and submitted to the Court for consideration and decision.

[fol. 382]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Stephens, Pope, Barnes, Hamley, Hamlin, Jertberg, Merrill & Koelsch, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—March 23, 1960

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 383]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

No. 15,284

PACIFIC REEFER and PACIFIC REEFER FISHERIES, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

No. 15,285

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

No. 15,286

ALASKA REEFER and ALASKA REEFER FISHERIES, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

No. 15,287

NORTH STAR and NORTH STAR FISHERIES, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

No. 15,288

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

Appeals From the United States District Court for the District of Alaska, First Division

---

OPINION—March 23, 1960

Before: Chambers, Chief Judge, and Stephens, Pope, Barnes, Hamley, Hamlin, Jertberg, Merrill, and Koelsch, Circuit Judges.

HAMLEY, Circuit Judge:

These actions were brought by the Territory of Alaska to recover unpaid license taxes incurred in the operation of [fol. 384] freezer ships during the years 1951 through 1954. The partnerships and corporation which were named defendants denied liability. Four of them counterclaimed to recover taxes which they had paid.[1] The actions were consolidated for trial.

---

[1] The defendants are as named in the title of this action. The counterclaims were filed by Arctic Maid, Pacific Queen, Alaska Reefer, and North Star.

Judgment was entered for Alaska and against each defendant, the total award being $116,731.53. In support of this judgment the trial court filed an opinion containing findings of fact and conclusions of law in addition to a discussion of the issues. Territory of Alaska v. The Arctic Maid, 140 F.Supp. 190. In an unreported supplemental opinion thereafter filed there is further discussion of some of the issues.

Defendants have joined in this appeal. They raise a number of questions relating to the construction of the taxing statute, the territorial jurisdiction of Alaska over the business activity in question, and the validity of the tax, as applied, under certain constitutional and statutory provisions. Two of the defendants, Northern Reefer Company and Grimes Packing Company, present an additional question relating to the enforceability of a tax lien asserted against the freezer ship Reefer II.

The appeal was originally argued before a court consisting of two circuit judges and one district judge. After an opinion had been filed by the court as so constituted a rehearing en banc was granted. The previously entered opinion is hereby withdrawn and this opinion by the court en banc is entered in substitution therefor.

The facts necessary to be considered are not in dispute. Appellant Arctic Maid is a Washington corporation not qualified to do business in Alaska. The remaining appellants are partnerships, all members of which are residents of either the State of Washington or the State of California, and all are citizens of the United States. None of the copartners resides in Alaska. All of the appellants operate canneries located on Puget Sound in the State of Washington. In order to obtain fish for their respective canneries they each send freezer ships to the waters adjacent to Alaska each year during the salmon season. [fol. 385] The freezer ships are vessels equipped with refrigeration and storage facilities for the freezing, storage, and transportation of fish. They are also equipped to provide transportation facilities for fishermen, and food and quarters for fishermen during the Alaska fishing season. In addition these freezer ships provide means for transport-

ing "catcher" boats from Puget Sound to Alaskan fishing waters and back again at the end of the fishing season.

The fish are caught from the catcher boats, and are then transferred to the freezer ships. These catcher boats are of a general type commonly known as "Bristol Bay gillnetters." They are gas-powered vessels about thirty to thirty-two feet in length.

In most instances these gillnetters are owned by appellants and are transported from and returned to Puget Sound aboard the freezer ships. In some cases gillnetters owned by appellants are not transported to and from Puget Sound, but are stored ashore in the Bristol Bay area. In other instances appellants have contracted with others owning gillnetters to catch fish for the freezer ships during the salmon season.

The gillnetters are manned by fishermen—two to each boat—employed each season by appellants under the terms of the current Bristol Bay agreement between the salmon industry and the Alaska Fishermen's Union.[2] In addition to obtaining fish through the use of gillnetters owned by or operated under contract with appellants, fish are also purchased from independent fishermen and taken aboard the freezer ships.

The freezer ships are utilized primarily in connection with the Bristol Bay red salmon season. They anchor seaward of a line drawn parallel to and at a distance of three miles from mean low tide mark on the shore of Bristol Bay and serve as a base for the operations of the gillnetters. [fol. 386] The gillnetters leave their respective freezer ships at the beginning of each open period during the fishing season and proceed to the fishing areas inshore. They traverse this inshore water, searching for fish, and return periodically to their freezer ships. The fish which have been caught are then transferred to the freezer ships by

[2] In broad outline the terms of employment of the fishermen provide that the defendants supply the gillnetters and all gear, pay the current seasonal price for the salmon caught and delivered to the freezer ships, provide food and quarters aboard the "mother ship," pay "run money" in the amount of $234 per man, furnish air transportation in one direction if desired by the fisherman, and provide fuel for the operation of the gillnetter.

means of a net suspended from a boom. As the fishermen throw the fish into the net the fish are tallied by the crew of the freezer ship. The fishermen's pay is based upon the number of fish so tallied.

During some of the years here in question some of the appellants operated their freezer ships at other times or in other areas than during the Bristol Bay red salmon season. For example, freezer ships were sometimes utilized in the Bristol Bay king salmon season, or in the Kodiak, Cook Inlet, or Southeastern Alaska areas. During these operations, as distinguished from the Bristol Bay red salmon season, the freezer ships were operated at points closer to shore than three miles and obtained fish from catcher boats while so positioned.

When fish are taken aboard the freezer ships from the gillnetters owned or operated under contract by appellants, or after purchase from independent fishermen, they are dumped into quick-freezing brine tanks. The freezing begins immediately and continues over a period of ten to twelve hours. During this time the brine in the tank is constantly changed and circulated. At the end of ten to twelve hours the temperature of the fish has been lowered to twelve to fifteen degrees and they are fully frozen.

Traps in the bottom of the brine tanks are then opened and by means of a chute the fish are directed into the refrigerated hold where they are stored until discharged at destination on Puget Sound. The brine tanks themselves are sometimes used for the storage of fish.[3]

At the conclusion of the operations in waters adjacent to Alaska appellants take on board the gillnetters which had [fol. 387] been transported from Puget Sound on the freezer ships. Appellants then return these freezer ships to Puget Sound and discharge the frozen fish at their respective canneries. During the years in question all but five hundred pounds of the frozen fish so transported to Puget Sound were canned there by appellants.

---

[3] During the 1951 season the freezing method employed aboard the vessel Pacific Queen was the so-called "air-blast" method. Under this method the fish are placed in racks and set into a freezing compartment where they are subjected to blasts of air at a sub-freezing temperature until fully frozen.

The Alaska license tax here in question has its genesis in Session Laws of Alaska 1949, chapter 97. Under this 1949 statute a one-per-cent annual license tax was imposed upon persons, firms, or corporations prosecuting certain lines of business. The specified lines of business were "cold storage and other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: . . . " It was provided that the annual tax would be equal to one per cent of the value of the fish " . . . bought or otherwise obtained for processing through freezing, salting or other method."

It will be observed that in so far as cold storages are concerned no distinction was drawn in the 1949 statute between shore-based plants and freezer ships or other floating cold storages. All were to be taxed at the rate of one per cent of the value of the raw fish.

Such a distinction was drawn in 1951, however, when the territorial legislature enacted chapter 116, amending chapter 97, Sess. Laws Alaska 1949. In the 1951 enactment the lines of business to be taxed were divided into two groups. The first, consisting of "shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: . . . ," were taxed at the 1949 rate of one per cent. The second group, consisting of "freezer ships and other floating cold storages," were taxed at the rate of four per cent.[4]

---

[4] Sess. Laws Alaska 1951, chapter 116, reads as follows:

"Section 1. Section 1 of Chapter 97, Session Laws of Alaska, 1949, is hereby amended to read as follows;

"Section 1. BUSINESS IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

"(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other

[fol. 388] In 1949 Alaska also imposed a four-per-cent license tax on salmon canneries, both shore-based and floating (Sess. Laws Alaska 1949, ch. 82). This tax was raised to six per cent in 1951. Sess. Laws Alaska 1951, ch. 113, Alaska Comp. Laws, Cum.Supp. 1958, § 35-1-91.[5] Also in 1949 Alaska imposed a five-dollar annual license fee for resident commercial fishermen who take fish from the fishery resources of Alaska, and a fifty-dollar annual license fee on nonresident commercial fishermen engaged in the same activity. Sess. Laws Alaska 1949, ch. 66. This tax was thereafter declared invalid. Anderson v. Mullaney, 9 Cir., 191 F.2d 123, affirmed sub nom. Mullaney v. Anderson, 342 U. S. 415.

[fol. 389] One of the contentions made by appellants on this appeal is that the tax in question, as applied, imposes

---

fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

"(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval."

[5] This tax was computed on a somewhat different basis than the tax on shore-based cold storages and freezer ships and other floating cold storages, but the difference is immaterial for present purposes.

an undue burden on and discriminates against interstate commerce, and is an attempted regulation of interstate commerce, all in violation of Article I, section 8, of the Constitution. If this contention is well founded, it is dispositive of the entire case, since the tax would then be wholly invalid and unenforceable. We therefore proceed at once to a consideration of this question.

In asserting that the freezer-ship tax here in question is invalid under the Commerce Clause, appellants advance two arguments. The first is that the activity sought to be taxed is an inseparable part of interstate commerce and so is not subject to any state or territorial privilege tax. The second is that the statute, as enacted and administered, discriminates against the interstate transportation of salmon caught in Alaskan waters for canning outside of Alaska and in favor of the canning of such salmon within Alaska.

In dealing with either of these arguments it is first necessary to determine what business activity was intended to be taxed. Part of the activity of freezer ships, including at the very least the moving of the vessels to and from Bristol Bay and Puget Sound, occurs beyond the territorial jurisdiction of Alaska. If the tax is intended to include this extraterritorial activity of freezer ships, the tax is invalid —not under the Commerce Clause, but under the Due Process Clauses of the Fifth and Fourteenth Amendments.[6]

But, despite the broad language of chapter 116 in taxing the prosecution of the "line of business" of freezer ships, we are unwilling to believe that the legislature intended to impose such a clearly unconstitutional tax. Where a statute is reasonably susceptible of two constructions, that construction will ordinarily be accepted which avoids invalidation on a constitutional ground.[7]

Under all of the facts it is reasonable to assume that the freezer-ship activities which the territorial legislature had [fol. 390] in mind and intended to tax did not include any

[6] Miller Bros. Company v. Maryland, 347 U. S. 340, 342; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83; International Paper Co. v. Massachusetts, 246 U. S. 135, 141.

[7] United States v. Witkovich, 353 U. S. 194, 201; Singer Sewing Machine Co. v. Brickell, 233 U. S. 304.

which occurred while the freezer ships were beyond territorial waters.

A serious question is raised on this appeal as to whether the freezer ships while at anchor beyond the three-mile limit in Bristol Bay were in territorial waters. For the purpose of considering the Commerce Clause question we will assume that they were. It follows under this assumption that all activities of the "line of business" of freezer ships, carried on while the freezer ships were at anchor, were subject to Alaskan tax jurisdiction unless precluded by the Commerce Clause.

The question remains, however, whether chapter 116 was intended as a tax on all activity while the freezer ships were at anchor. The prime activity was the freezing and cold storage of fish preparatory to transporting the fish in interstate commerce for canning elsewhere. But, as an integrated part of the business of operating freezer ships, catcher boats owned or under contract to appellants were utilized in the catching of fish which were then taken aboard the freezer ships.

The trial court held that chapter 116 was not intended as a tax upon the activity of the freezer ships in freezing fish and maintaining the fish in cold storage. Rather, that court held, the only activity of freezer ships intended to be taxed under that chapter was the one of taking fish in territorial waters through utilization of catcher boats owned by or under contract to appellants.

In our opinion, however, the catching of fish is not the tax incident or a part of the tax incident contemplated by § 1(b) of chapter 116, taxing freezer ships. As therein provided, the tax is four per cent of the value of raw fish "bought or otherwise obtained for processing through freezing." The tax therefore applies whether or not the fish are caught by gillnetters owned by or under contract to appellants. The emphasis in the quoted statutory words is on the purpose of acquisition—not the manner of acquisition. The purpose which gives rise to the tax is "processing through freezing."

Thus it is the freezer-ship activity of processing through freezing which is taxed. The value of raw fish bought or otherwise obtained is referred to only in specifying the

[fol. 391] method of computing the tax. Likewise, under section 1(a) of chapter 116 the shore-based cold-storage activity which is taxed is that of "processing through freezing," whether the fish are acquired by purchase or otherwise.[8] Similarly, under Sess. Laws Alaska 1951, chapter 113, the salmon cannery activity which is taxed is that of "canning," whether the raw fish are "purchased or otherwise obtained."[9]

In concluding that the only activity here being taxed is the taking of fish, the trial court likened Sess. Laws Alaska 1951, chapter 116, to the taxing statutes which were upheld in Toomer v. Witsell, 334 U. S. 385, and Oliver Iron Mining Co. v. Lord, 262 U. S. 172.

In Toomer nonresident owners of commercial shrimp trawlers resisted a South Carolina tax of one-eighth cent a pound on green, or raw, shrimp taken within three miles of the coast of that state.[10] In holding that the tax was not invalid under the Commerce Clause, the court stated that the taxable event was the taking of shrimp.

Since the only activity involved in Toomer was that of operating commercial shrimp trawlers, the taxable event

---

[8] The testimony is undisputed that shore-based cold storages do not use catcher boats of their own. It also appears probable, though the evidence is not explicit on this, that much of the troll-caught fish used by shore-based cold storages are caught on the high seas. Hence, if the license tax on shore-based cold storages, which (except for the rate of tax) is to be computed in the same manner as for freezer ships, is deemed to be a tax on the catching of fish, Alaska is taxing shore-based cold storages on an extraterritorial activity of independent fishermen.

[9] Should it be held that the activity taxed under these three provisions is or includes the catching of fish, a grave due process question would be presented. This arises from the fact that the territorial legislature would then be chargeable with placing in one class and taxing the catching of fish by the use of boats owned by or operated for freezer ships, while placing in another class and not taxing the catching of fish by independent fishermen.

[10] The South Carolina statute provided:

> "The following fisheries' tax is hereby imposed upon all fish or fisheries products taken or canned, shucked or shipped for market, to-wit . . . on each pound of green shrimp, one-eighth of one percent. . . ."

[fol. 392] was necessarily the catching of shrimp. Here, however, the activity named in the taxing statute is that of operating freezer ships, the prime function of which is the freezing of fish. The holding in Toomer, that the taxable event there in question was the taking of fish, therefore provides no guidance which is helpful here.

We reach the same conclusion with respect to Oliver Iron Mining Co. v. Lord, supra, also relied upon by the trial court. In that case a six-per-cent occupation tax was levied upon "every person engaged in the business of mining or producing iron ore or other ores in this state . . ." It was provided that the tax would be equal to six per cent of the valuation of the ore mined or produced. In upholding the tax against a Commerce Clause challenge the court stated that the tax was levied on the business of mining ore. Since the only activity there in question was the mining of ore, the court's conclusion as to the taxable event necessarily followed.

We hold that the only tax incident defined in chapter 116 is the freezing and cold storage of fish aboard freezer ships while the ships are at anchor in what we, for present purposes, assume to be territorial waters.

As before noted, it is one of appellants' contentions under their Commerce Clause point that this activity is an inseparable part of interstate commerce and so is not subject to any privilege tax, whether or not discriminatory.

The basic premise of this argument is established law. A state may not lay a tax on the "privilege" of engaging in interstate commerce.[11] Where this is the nature of the tax the Commerce Clause forbids its imposition, whether or not discriminatory and regardless of the amount of the tax or the method of computation.[12] Likewise, the fact that the taxpayer has received benefits through local conservation measures is immaterial. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 163-164.

---

[11] Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450, 458; Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 610; Joseph v. Carter & Weekes Co., 330 U. S. 422, 433; McGoldrick v. Berwind-White Co., 309 U. S. 33, 48.

[12] Spector Motor Service, Inc. v. O'Connor, supra, p. 607; Joseph v. Carter & Weekes Co., supra, p. 433.

[fol. 393] It is to be noted that the cases draw a clear distinction between the privilege taxes and state exactions taking the form of compensation for the use of highways, collections in lieu of an ad valorem property tax, inspection fees, taxes on sales or use, excise or privilege taxes on activities before interstate commerce begins and after it ends, or fairly apportioned net income taxes. All of the latter may be the subject of nondiscriminatory state or local impositions.[13] But the right to engage in interstate commerce is not a privilege conferred by state or local government, and may not be taxed as such.

The critical question, then, is whether the activity of freezing and cold storing fish, engaged in by freezer ships while lying at anchor in territorial waters preparatory to transporting such fish to the State of Washington for canning, is an inseparable part of interstate commerce. If so, any territorial privilege tax thereon is forbidden by the Commerce Clause.

The freezing and cold-storage activity in question is a "local" activity in the sense that under the assumptions here made it takes place within Alaskan territorial jurisdiction. This is true of most interstate commerce activity. The individual phases thereof take place within the boundaries of one state or another, except, as in this case, where part of the transportation is on the high seas. But if such local activity is of a kind which cannot be separated from the interstate process, the flow of commerce, it must be regarded as an integral part of interstate commerce. Michigan-Wisconsin Pipe Line Co. v. Calvert, supra, p. 166.

In determining whether the activity here in question can be separated from the interstate process, the flow of commerce, the case of Joseph v. Carter & Weekes Co., supra, provides helpful guidance. In that case a nondiscriminatory municipal excise tax on the gross receipts of a stevedoring company engaged in loading and unloading vessels moving in interstate and foreign commerce was declared invalid under the Commerce Clause. In holding that such

---

[13] Northwestern Cement Co. v. Minnesota, supra, pp. 458-459; Spector Motor Service, Inc. v. O'Connor, supra, p. 607; McGoldrick v. Berwind-White Co., supra, p. 47.

a tax is not apportioned to income derived from activities within the taxing state, the court stated (at pages 427-428):

> [fol. 394] "The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." [14]

The activity being taxed in our case, the freezing and cold storage of fish engaged in by the line of business of freezer ships, takes place after the fish are loaded on the vessel which is to transport them in interstate commerce. Thus, applying the "loading and unloading" test of the Joseph and Richfield Oil Corporation cases, supra, this freezing and cold-storage activity takes place after the flow of interstate commerce has begun, and is therefore an integral part of such commerce.

But, apart from the somewhat mechanical test of whether the activity takes place with or after loading on the interstate vehicle, the rationale of the Joseph decision calls for the same conclusion. In that case loading of cargo on the interstate carrier was held to be an activity in interstate commerce because it involved the transportation vehicle itself and was preliminary to and an essential part of the safety and convenience of that transportation. Likewise here, the freezing and cold-storage activity takes place after the fish are loaded on the interstate carrier and is preliminary to and an essential part of the transportation itself. This freezing and cold storage is solely for the purpose of preserving the fish so that they may be so transported, such transportation being otherwise impossible.

---

[14] See, also, Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 83, where the court said: ". . . the commencement of the export would occur no later than the delivery of the oil into the vessel." In Michigan-Wisconsin Pipe Line Co. v. Calvert, supra, the activity sought to be taxed included processing after the product, natural gas, had passed into the facilities of the interstate carrier. The tax was declared invalid under the Commerce Clause.

Appellants make no contention that the activity of catching fish in Alaskan waters would not be amenable to a nondiscriminatory local privilege tax. Toomer v. Witsell, supra, establishes that such an activity may be taxed. See, also, Anderson v. Mullaney, supra, page 129. But where, [fol. 395] as here, the processing activity constituting the tax event occurs subsequent to loading the product on the interstate carrier and is indispensable to such transportation, any local privilege tax thereon is forbidden by the Commerce Clause.

The judgment is reversed and the cause is remanded with directions to enter judgment for appellants on the tax claims, and to adjudicate the counterclaims.

[File endorsement omitted]

[fol. 396] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

JUDGMENT—Filed and Entered March 23, 1960

Appeal from the District Court for the Territory (now State) of Alaska, First Division.

This Cause came on to be heard on the Transcript of the Record from the District Court for the Territory (now State) of Alaska, First Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said

District Court in this Cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee, and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment for the appellants on the Tax claims, and to adjudicate the counterclaim.

It Is Further Ordered and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

[fol. 397] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15284

PACIFIC REEFER and PACIFIC REEFER FISHERIES, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

JUDGMENT—Filed and Entered March 23, 1960

Appeal from the District Court for the Territory (now State) of Alaska, First Division.

This Cause came on to be heard on the Transcript of the Record from the District Court for the Territory (now State) of Alaska, First Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee, and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment for the appellants on the Tax claims, and to adjudicate the counterclaim.

It Is Further Ordered and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

[fol. 398] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15285

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

JUDGMENT—Filed and Entered March 23, 1960

Appeal from the District Court for the Territory (now State) of Alaska, First Division.

This Cause came on to be heard on the Transcript of the Record from the District Court for the Territory (now State) of Alaska, First Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee, and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment for the appellants on the Tax claims, and to adjudicate the counterclaim.

It Is Further Ordered and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

[fol. 399] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15286

ALASKA REEFER and ALASKA REEFER FISHERIES, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

JUDGMENT—Filed and Entered March 23, 1960

Appeal from the District Court for the Territory (now State) of Alaska, First Division.

This Cause came on to be heard on the Transcript of the Record from the District Court for the Territory (now State) of Alaska, First Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee, and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment for the appellants on the Tax claims, and to adjudicate the counterclaim.

It Is Further Ordered and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

[fol. 400] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15287

NORTH STAR and NORTH STAR FISHERIES, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

JUDGMENT—Filed and Entered March 23, 1960

Appeal from the District Court for the Territory (now State) of Alaska, First Division.

This Cause came on to be heard on the Transcript of the Record from the District Court for the Territory (now State) of Alaska, First Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee, and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment for the appellants on the Tax claims, and to adjudicate the counterclaim.

It Is Further Ordered and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

[fol. 401] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15288

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, Appellants,

vs.

TERRITORY OF ALASKA, Appellee.

JUDGMENT—Filed and Entered March 23, 1960

Appeal from the District Court for the Territory (now State) of Alaska, First Division.

This Cause came on to be heard on the Transcript of the Record from the District Court for the Territory (now State) of Alaska, First Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee, and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment for the appellants on the Tax claims, and to adjudicate the counterclaim.

It Is Further Ordered and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

[fol. 402] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 403]

SUPREME COURT OF THE UNITED STATES

No. 106—October Term, 1960

ALASKA, Petitioner,

vs.

ARCTIC MAID, ET AL.

ORDER ALLOWING CERTIORARI—October 10, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LE COPY

Office-Supreme Court, U.S.
FILED
MAY 27 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 962 106

STATE OF ALASKA, *Petitioner*,

v.

ARCTIC MAID AND ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC REEFER AND PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC QUEEN AND PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

ALASKA REEFER AND ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTH STAR AND NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY AND REEFER II, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RALPH E. MOODY
Attorney General for Alaska
430 Capitol Building
Post Office Box 2170
Juneau, Alaska

GARY THURLOW
Deputy Attorney General
430 Capitol Building
Post Office Box 2170
Juneau, Alaska

Counsel for Petitioner, State of Alaska.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
CITATION TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT	6
REASONS FOR GRANTING WRIT	9
I. The Incidence of the Tax Is on the Carrying On of Any Part of a Freezer Ship Business that Occurs within Alaskan Waters, and Is Not on the "Freezing of Fish"	9
II. Freezer Ships, in Taking and Processing Fish by Freezing, Are Not Engaged in Interstate Commerce, But Are Instead Engaged in Business of a Local Nature	11
III. Any Attempt by Alaska to Correct the Discriminatory Effect of the Exemption of Freezer Ships Operations from State Taxation Would Require a Drastic Change in the Social, Economical and Political Approach to Taxation in Alaska	16
CONCLUSION	18

APPENDIX A—Opinion of Ninth Court of Appeals dated March 16, 1959	1a
APPENDIX B—Opinion and Judgment below	20a
APPENDIX C—Section 1, Chapter 82, SLA 1949	36a
APPENDIX D—Section 1, Chapter 97, SLA 1949	37a
APPENDIX E—Chapter 113, SLA 1951	38a
APPENDIX F—Map of Bristol Bay, Alaska	39a

CITATIONS

CASES: Page

Chassaniol v. City of Greenwood, 291 U.S. 584 (1934) 13
Coverdale v. Arkansas—Louisiana Pipeline Co., 303 U.S. 604 (1938) 13
Empresa Siderurgica S.A.V. County of Merced, 32 Cal. 2d 68, 194, P. 2d 527, 11 A.L.R. 2d 934 (1948) 13
Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) ... 13
Joseph v. Carter & Weekes Co., 330 U.S. 422 (1947) ..9, 11
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 11, 14
Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) .. 12
Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 9, 11, 14
Territory of Alaska v. The Artic Maid, Alaska 1956, 140 F. Supp. 190 8
Toomer v. Witsell, 334 U.S. 385 12
Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) 13

STATUTES:

Act of June 6, 1900, c. 786, 31 Stat. 322, as amended, 48 U.S.C., § 101 2
Act of June 14, 1906, c. 3299, 34 Stat. 263, 48 U.S.C., §§ 244-247 15
Act of June 26, 1906, c. 3547, 34 Stat. 478, 48 U.S.C., §§ 230, 231, 235-239, 241, 242 15
Act of June 6, 1924, c. 272, 43 Stat. 464, 48 U.S.C., §§ 225-228 15
28 U.S.C., § 1254(1) 3
28 U.S.C., § 1254(2) 11
28 U.S.C., § 1291 2
28 U.S.C., § 1294(2) 2
Act of July 7, 1958, 72 Stat. 339 16
Section 1, Chapter 82, Session Laws of Alaska 1949 .. 7
Section 1, Chapter 97, Session Laws of Alaska 1949 .. 4, 7
Section 1, Chapter 113, Session Laws of Alaska 1951 .. 7
Section 1, Chapter 116, Session Laws of Alaska 1951 4, 7, 8

MISCELLANEOUS:

Paul J. Hartman, *State Taxation of Interstate Commerce* (Dennis & Co., Inc.) 1953 ed., at p. 99 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

STATE OF ALASKA, *Petitioner*,

v.

ARCTIC MAID AND ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC REEFER AND PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC QUEEN AND PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

ALASKA REEFER AND ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTH STAR AND NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY AND REEFER II, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit, entered in the above entitled causes on March 23, 1960.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court for the Territory of Alaska, Division Number One, at Juneau, entered March 17, 1956, reported at 140 F. Supp. 190, and a supplemental opinion of that court entered May 25, 1956, are set forth on pages 60 and 82 of the Record. The opinion of the United States Court of Appeals for the Ninth Circuit, dated March 16, 1959, is attached to this petition as an Exhibit "A". The opinion and judgment of the Ninth Court of Appeals, dated March 23, 1960, superseding the earlier decision of that court, is attached to this petition as an Exhibit "B".

JURISDICTION

These causes were first heard before the District Court for the Territory of Alaska, Division Number One. The jurisdiction of the District Court was invoked because the causes arose before Alaska became a state during which time the District Court under the Act of June 6, 1900, c. 786, 31 Stat. 322, as amended, 48 U.S.C., § 101, had jurisdiction of both matters over which state courts ordinarily have jurisdiction and matters over which federal courts have jurisdiction. On May 25, 1956, judgment was entered by the District Court. These causes were then appealed by respondents to the United States Court of Appeals for the Ninth Circuit under Title 28, U.S.C., Sections 1291 and 1294(2) and were heard by a division of that court. On March 16, 1959, the Ninth Court of Appeals entered an opinion and a judgment vacating the judgment of the District Court and remanding the causes for a

redetermination of the taxes (which were the subject of these causes) according to the court's opinion and for re-examination of the status of a tax lien in one of the causes. On November 9, 1959, a rehearing of the matter was granted by the Court. On March 23, 1960, after the causes were heard and submitted to the Court en banc an opinion and judgment were entered reversing the District Court and remanding the causes with directions to enter judgment for appellants on the tax claims, and to adjudicate the counter claims (for taxes paid under the tax statute held to be invalid).

The jurisdiction of the Supreme Court to review this judgment is invoked under Title 28, United States Code Section 1254(1).

QUESTIONS PRESENTED

1. Whether a tax on the freezer ship line of business carried on in connection with Alaska's commercial fisheries, which tax is based upon an annual license tax measured by 4% of the value of the fisheries products bought or otherwise obtained for freezing, is (a) a tax on the taking of fish (as the trial court held), (b) a tax on the entire operation of freezer ships to the extent that such operations occur within Alaska's taxing jurisdiction (as the Ninth Court of Appeals first held), or (c) a tax only on the "processing of fish by freezing" (as the Ninth Court of Appeals held on rehearing).

2. Whether freezer ships, which lie off the three mile limit of Alaska (or, if Bristol Bay is an inland bay of Alaska, within Alaskan waters), and which send their catcher boats within Alaskan waters to catch salmon, and which freeze such fish caught within Alaskan waters and also fish purchased from independent fisher-

men, pending their transportation to Seattle, Washington, are engaged in interstate commerce and for that reason exempt from the Alaska annual license tax?

3. Whether the fact that an integral part of the operation of a freezer ship in Alaska is the catching of salmon within Alaska waters and preserving the fish obtained is sufficient to characterize the business of a freezer ship as being local in nature, and therefore, not a part of interstate commerce?

STATUTES INVOLVED

The statute involved is Chapter 116, Session Laws of Alaska 1951, and in particular Section 1(b) of that statute. The statute provides:

"Amending Section 1 of Chapter 97, Session Laws of Alaska, 1949 imposing a license tax on freezer ships and other floating cold storages; and declaring an emergency.

"Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Section 1 of Chapter 97, Session Laws of Alaska, 1949, is hereby amended to read as follows:

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. *Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:*

"(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries

otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

(b) *Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.*"

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval."

"Approved March 24, 1951."

In order to present to the Court a picture of the Alaska program for taxing fish processors applicable portions of the following statutes will be referred to and are printed in the Appendix as follows: Sec. 1, Ch.

82, SLA 1949—Exhibit "C"; Sec. 1, Ch. 97, SLA 1949—Exhibit "D"; Ch. 113, SLA 1951—Exhibit "E".

STATEMENT

Beginning in approximately 1950 freezer ships owned by the respondents have visited the Alaska coast to launch "catcher" boats to be used in taking salmon within three miles of the low tide mark along the Alaska shore-line. On occasion some of the freezer ships have purchased salmon from independent fishermen.

The great bulk of the operations of the freezer ships are carried on in Bristol Bay. Bristol Bay is a large very shallow bay formed to a large extent by the estuaries of the Nushagak, Kvichak and Egekik Rivers. For the Court's convenience a map of Bristol Bay is attached as an Exhibit "F". Bristol Bay is the major fishing ground in Alaska and the world for red (sockeye) salmon. When operating in Bristol Bay the freezer ships anchor seaward of a line drawn parallel to and at a distance of three miles from mean low tide where they serve as a base for their catcher boats. When operating near Kodiak Island and in southeastern Alaska they anchor closer to shore and obtain fish from catcher boats while so positioned.

When a catcher boat has made its catch, it returns to the freezer ship and unloads. The fish are immediately frozen in brine and stored. At the end of the season the catcher boats are loaded on the freezer ships and the freezer ships return to canneries on Puget Sound with their catch. There the respondents unload, thaw and can the fish. (R. 37-42).

Beginning in 1949 the Territory of Alaska instituted a policy of taxing all fish processors engaged in busi-

ness "in connection with Alaska's fisheries". The first of such legislation was a 1949 Act taxing the business of salmon canneries by a tax measured by the value of salmon purchased or otherwise obtained for processing. The rate of the tax was set at 4 per cent of the value of the salmon so obtained. Salmon cold storages freezing fish for the fresh fish market were similarly taxed at 1 per cent, herring processing plants at 1 per cent, crab canneries at 1 per cent and clam canneries at 2 per cent, except for butter clam canneries which were taxed at 1 per cent. See Chapter 82, SLA 1949 which is attached to this petition as an Exhibit "C".

Later in that same session cold storages and fish processors not already taxed were made subject to a tax measured by 1 per cent of the values of fisheries products purchased or otherwise obtained for processing. See Chapter 97, SLA 1949 which is attached to this petition as an Exhibit "D".

In 1951 the tax on salmon canneries was increased to 6 per cent. See Chapter 113, SLA 1951 attached as an Exhibit "E". In the same year Ch. 97, SLA 1951 was amended by Ch. 116, SLA 1951 to bring freezer ships and floating cold storages "in connection with Alaska's fisheries" within the scope of the Alaska tax program for taxing fish processors. The prosecution of the freezer ship line of business in Alaska was made a taxable incident and the measure of the tax was set at 4 per cent of the value of fisheries products purchased or otherwise obtained for processing through freezing.

In 1955 the Territory of Alaska brought suit against six freezer ship operators to collect $116,731.53 claimed to be owing under the provisions of Ch. 116, SLA 1951 for taxes, penalties, and interest for the years 1951-1955.

The freezer ship operators attacked Ch. 116, SLA 1951 on several grounds alleging: (1) repugnance of the statute to the Constitution and federal statutes, (2) that the tax, because of the territorial limits of Alaska's taxing jurisdiction, does not apply to fish on board the freezer ship when it is more than three miles from shore, even though the fish have been caught within the three-mile distance, and (3) that the tax applies only to fish obtained for freezing and that freezer ships obtaining their fish for canning.

On March 17, 1956, the trial court upheld the tax finding that the taxable event was the taking of the fish and that the tax applied to all fish obtained by the freezer ships. *Territory of Alaska* v. *The Arctic Maid*, Alaska 1956, 140 F. Supp. 190 (R. 60, 82).

The freezer ship operators then prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit where the case was argued before a division of that court. On March 16, 1959, the Ninth Court of Appeals held that the incidence of the tax was on the operation of freezer ships, that the tax could only apply to operations of freezer ships within Alaska's taxing jurisdiction, that catcher boats operated by the freezer ship itself are but an extension of the ship's operations and that the freezer ships were subject to taxation measured by the value of the fish obtained by their catcher boats. The court ruled that the freezer ships were not required to pay Alaska taxes on fish obtained within Alaskan waters by independent catcher boats but purchased by the freezer ships outside of those waters. The Court also ruled that part but not all of Bristol Bay is within the taxing jurisdiction of the State of Alaska. See Exhibit "A" for a copy of that opinion.

On November 8, 1959, the Ninth Court of Appeals granted a rehearing. The case was then argued before the Court en banc. On March 23, 1960 the Court filed its opinion. The Court first held that the taxable event was the freezing of fish and then applying the "loading and unloading" test of *Joseph* v. *Carter & Weekes Co.*, 330 U.S. 422, 433 (1947) and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 83 (1946), held that the freezing and cold storage activity of freezer ships takes place after the flow of interstate commerce has begun, that the activity of freezing and cold storing fish, engaged in by freezer ships while lying at anchor in territorial waters preparatory to transporting such fish to the State of Washington for canning is an inseparable part of interstate commerce, and that any territorial privilege tax on such activity is forbidden by the Commerce Clause. See Exhibit "B".

REASONS FOR GRANTING WRIT

I

The Incidence of the Tax is on the Carrying on of Any Part of a Freezer Ship Business That Occurs Within Alaskan Waters, and Is Not on the "Freezing of Fish"

The United States Court of Appeals for the Ninth Circuit confused the incidence of the tax and the measure of the tax. A reading of the statute will quickly reveal that the taxable event is the prosecution of the freezer ship line "of business in connection with Alaska fisheries." There is no justification in looking further into the tax statute to determine whether or not the measure of the tax broadens or narrows this event. However, even if this is done it will be seen that there is nothing in the measure of the tax to further define the taxable event. The measure is four per cent of the value of raw fish "bought or otherwise obtained for

processing through freezing." The words "through freezing" are surplusage since a freezer ship is engaged in the business of a freezer ship only when and to the extent that it freezes fish obtained. To the extent that it uses fish for some other purpose, to that extent it is engaged in another line of business, and it would, to that extent, be taxed under the appropriate Alaska processor tax. For example, if the ship obtained the fish for canning it would be taxed as a floating cannery at six percent of the value of the fish obtained for canning.

The Ninth Court of Appeals dwelled on the words "processing through freezing" and concluded that this put the emphasis on only one of the many phases of a freezer ship operation in Alaska (Exhibit B, p. 8). Under this construction of a business license statute the tax is not on the whole business of the taxpayers occurring within Alaska, but only one narrow aspect of it. This is an exceedingly odd construction of a business license tax. If any emphasis is to be placed on the language defining the measure of the tax it should be placed on the words "bought or otherwise obtained", that is, the taking of the fish. This was the ruling of the trial court.

We believe that the Ninth Court of Appeals was correct the first time it heard the case and found the taxable event to be that portion of the freezer ship's operations which occur in Alaska's taxing jurisdiction.

Each of the three times these cases have been before United States Courts the taxable incident has been found at a different place. A decision by the United States Supreme Court distinguishing between the incidence of a tax and the measure of a tax would obvi-

ously have a healthy effect in making the decisions of courts more predictable and should clear away much of the confusion that now exists in construing tax statutes.

The construction of the statute by the Ninth Court of Appeals is particularly unfortunate for the State of Alaska since it makes it impractical for the state to appeal this matter to the Supreme Court under Title 28, U.S.C., § 1254(2). Although the major impact and unsettling effect of the court's opinion is in connection with the Commerce Clause of the United States Constitution it is impossible to properly reach this constitutional question affecting a state statute without first defining the taxable event. This can be done only by applying for a writ of certiorari.

II

Freezer Ships, in Taking and Processing Fish By Freezing, Are Not Engaged in Interstate Commerce, But Are Instead Engaged in Business of a Local Nature

The Ninth Court of Appeals has held that freezer ships cannot be taxed under the Alaska freezer ship tax because their activities are inseparable from interstate commerce. For purposes of analyzing the problem the court referred to cases involving business activities which are entirely and classically interstate in nature. Among the cases referred to are a stevedoring case [*Joseph* v. *Carter & Weekes Co.*, 330 U.S. 422, 433 (1947)], an oil tanker case [*Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 83 (1946)] and a natural gas transmission line case [*Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 163-164 (1954)]. This line of cases, along with common carrier and communications cases, represent one clear

line of authority. These cases all relate to businesses the major purpose of which is to transport goods and services in interstate commerce. None of these cases relate to businesses which are partially or entirely engaged in activities of a purely local nature such as fishing, mining and the extraction of oil and gas resources.

The court discussed but refused to follow another clear line of authorities regarding the taxation of businesses which take or extract resources for later shipment in interstate commerce represented by *Toomer* v. *Witsell*, 334 U.S. 385 (1948) (taking of shrimp in coastal waters of South Carolina) and *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923) (mining of iron ore). The rule in the two foregoing cases is that a tax on the extraction of resources does not burden interstate commerce since the taxable event, the severing of the resources, occurs before the resources can be said to have entered the flow of interstate commerce. By the same token the preservation of resources just severed is so closely tied in with the taking of the resources that it too must be considered local in nature and as occurring before the resources can be said to have entered the flow of interstate commerce. The *Oliver Iron Mining Co.* case *supra*, is particularly in point since the United States Supreme Court sustained a tax upon the mining of ore although substantially all the ore left the State and was put upon cars for that purpose by the same act by which it was produced.

The Ninth Court of Appeals by placing an extractive preservation type industry under transportation and oil pipeline cases has undermined the authority of the *Toomer* and *Oliver Mining Company* cases *supra*. By its decision it has unnecessarily obscured and con-

fused the once clear distinction between cases dealing with common carriers and the interstate shipment of materials and services and cases dealing with the extraction of resources and the immediate preservation of resources severed.

We believe that the following from Paul J. Hartman, *State Taxation of Interstate Commerce* (Dennis & Co., Inc.), 1953 ed., at p. 99, correctly expresses the rule:

> "Where, however property has not begun to move in interstate commerce, it is not immune from various state privilege taxes, although the property ultimately will be transported beyond the borders of the taxing state. Even the fact that goods are being processed or prepared for an interstate journey has not exempted from various sorts of nondiscriminatory privilege taxes either the processing or preparing of the articles themselves, or those who manufactured or otherwise processed or prepared the article for the interstate passage."

In support of this rule see *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284 (1927) (privilege tax on "producers of natural gas reckoned according to the value of that commodity at the well," upheld); *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932) (license tax on manufacture, generation or production of electricity, upheld); *Chassaniol* v. *City of Greenwood*, 291 U.S. 584 (1934) (occupation tax on buying and selling cotton locally, produced, processed and warehoused after it had been ginned and before its shipment to other states, upheld); *Coverdale* v. *Arkansas-Louisiana Pipeline Co.*, 303 U.S. 604 (1939) (privilege tax on production of mechanical power used to operate compressor which increases pressure of natural gas permitting gas to be transported to purchasers in other states, upheld); *Empresa Siderurgica S. A.* v. *County of Merced*, 32

Cal. 2d 68, 194 P. 2d 527, 11 ALR 2d 934 (1948) (property tax on cement plant in process of being dismantled and packaged by trucking company (licensed as a common carrier) for shipment to Columbia, upheld). *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra* can be distinguished since there the tax was levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing. *Richfield Oil Corp.* v. *State Board of Equalization, supra*, can be similarly distinguished. In the case at bar the tax falls *on* the production, gathering and processing of fish *before* they are transported from Alaska.

If the major activities of a freezer ship were merely the purchasing, freezing and shipment of salmon, then perhaps the freezing part of the operation could be most logically tied in with the later shipment of the fish to another state. However, here the freezer ships are engaged in catching fish and freezing fish until a full freezer ship load of fish is obtained. The freezing of fish is geared to the preserving of the fish as they are caught. For that reason a freezer ship's operation is not analogous to refrigerated box cars running back and forth from farming areas to market or to an oil tanker plying between ports. The analogy is closer to the dairyman who produces milk and chills it until he can get it to the market or to the pea farmer who is engaged in the raising and freezing of peas. That portion of a freezer ship operation which occurs in Alaska should be characterized as being local since the freezing done in Alaska grows directly out of the extractive operation of the freezer ships and before any attempt is made to move the processed product to market. The fact that the freezing of the fish caught occurs on water

rather than land is of no particular relevance or significance. It merely means that the appellants are somewhat more mobile than their land based competitors.

Even if the taxable event were the freezing and the freezing alone, under these circumstances the freezing is an activity which is local in nature and which takes place before the product so processed enters the flow of interstate commerce. The chief reason that this construction of the freezer ship tax statute is objectionable is that it may have the effect of placing the bulk of the otherwise taxable freezer ship activities outside of the geographic limits of Alaska's taxing jurisdiction.[1]

[1] If the Ninth Court of Appeals in its first decision of March 16, 1959 is correct a good part of the freezing activities of the freezer ships takes place outside of the taxing jurisdiction of Alaska. That court declared most of Bristol Bay to be outside of Alaska's taxing jurisdiction. Under that decision the only part of much of the freezer ships operations the Alaska tax could reach would be the fishing operations of the freezer ships carried on by their catcher boats. Under that decision the freezing would in many, and perhaps most cases, occur outside of Alaska's taxing jurisdiction.

Alaska strongly maintains however that the portion of Bristol Bay east of a line drawn from Cape Newenham to a point 3 miles south of Cape Menshikof is within Alaska's jurisdiction for both taxation and conservation purposes. In support of this the State of Alaska points to a 36 year history of exclusive control over Bristol Bay by the Federal Government for conservation purposes under fish and wildlife regulations promulgated under the Act of June 26, 1906, c. 3547, 34 Stat. 478, 48 U.S.C. §§ 230, 231, 235-239, 241, 242 (beginning with Department of Commerce Circular No. 251, 9th Ed. dated Jan. 9, 1923 and ending with 24 FR 3265-3268), the long standing policy of excluding aliens from such waters under the Act of June 14, 1906, c. 3299, 34 Stat. 263, 48 U.S.C. §§ 244-247 and the policy of establishing closed seasons and similar conservation controls in only the waters "over which the United States has jurisdiction" as provided in the Act of June 6, 1924, 43 Stat. 464, c. 272, 48 U.S.C., §§ 225-228, relating to the "protection of fisheries in Alaska and for other purposes". Bristol

III

Any Attempt by Alaska to Correct the Discriminatory Effect of the Exemption of Freezer Ships Operations From State Taxation Would Require a Drastic Change in the Social, Economic and Political Approach to Taxation in Alaska

A review of the various fish processing taxes on fish processors described herein will reveal that it has been the policy of Alaska to insure that the taking of every fish, clam, crab and other fisheries products taken for commercial purposes in Alaska will result in the paying of tax revenues to Alaska and will contribute in meeting the costs of conserving Alaska's fisheries resources. It is also apparent that Alaska has seen fit to place the tax burden on fish processors and not on the fishermen.

The recent decision of the Ninth Court of Appeals creates a gaping hole in this tax structure. Now all but one class of fish processors processing fish in Alaska are taxed according to the value of the fish taken or obtained. There is now an exception for freezer ships. The taking or obtaining of fish by freezer ships will not now contribute to Alaska's tax revenues nor to the costs of maintaining Alaska's fisheries resources.

This discrimination is so unfair as to demand some correction. A solution is suggested in the next to-last paragraph of the opinion of the Ninth Court of Appeals:

> "Appellants make no contention that the activity of catching fish in Alaskan waters would not be amenable to a non-discriminatory local privileg

---

Bay constitutes waters over which the United States has asserted such jurisdiction and for which closed seasons have been prescribed. Alaska succeeded to most of the Federal Government's responsibility for conservation of fish and wildlife resources in Alaska (including Bristol Bay), under Sec. 6(e) of the Act of July 1958, 72 Stat. 339 (the Alaska Statehood Act).

tax. Toomer v. Witsell, supra, establishes that such an activity may be taxed. . . ." (Exhibit B, p. 20a).

However, such a solution could only be adopted by abandoning a social, economic and political approach to taxation in Alaska which has been followed for more than 10 years. Presumably a tax could not be constitutionally devised which is levied only upon fish caught by freezer ships. If a severance tax should be placed on fish caught by freezer ships in lieu of a fish processor tax, it would also be necessary to impose severance taxes on all other fish caught in Alaska waters. There are obvious reasons why the Alaska legislature would be reluctant to shift the tax burden from a relatively few solvent fish processors to a large number of fishermen, many of whom are in a poor position to pay substantial severance taxes and many of whom are not accustomed to keeping tax records, or for that matter, records of any kind.

It is apparent that the recent decision of the Ninth Court of Appeals will have an unusual impact in Alaska. Not only does the State stand to lose more than $116,731.53 involved for the tax years 1950-1955, but it also stands to lose a similar sum for the years 1955-1960. If the discrimination against other fish processors in Alaska is permitted to continue for subsequent years the State will incur additional yearly losses in revenue, while at the same time, operators of freezer ships will continue to have an unfair competitive advantage over fish processors who are taxed. If on the other hand the State attempts to remedy this discrimination by shifting its fish taxes from the operations of the processors to the taking of fish by the fishermen it will subject a good portion of the Alaska

community to taxes which are not only unpopular among the persons which would then be taxed, but which are generally distasteful for social and economic reasons to the Alaska population at large.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

RALPH E. MOODY
Ralph E. Moody
Attorney General of Alaska

Counsel for Petitioner,
State of Alaska

Dated this 18th day of
May, 1960, at Juneau, Alaska.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,284

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,285

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,286

ALASKA REEFER and ALASKA REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,287

NORTH STAR and NORTH STAR FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,288

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

Mar. 16, 1959

Appeal from the United States District Court for the District of Alaska, First Division

Before: FEE and HAMLEY, Circuit Judges, and SOLOMON District Judge

SOLOMON, District Judge:

This is an appeal from a judgment requiring appellants to pay to the Territory of Alaska certain taxes imposed as license fees on the freezer ships which they operated in Alaskan waters during the years 1951-1954. These taxes were imposed by Chapter 97, §1, Session Laws of Alaska, 1949, as amended by Chapter 116, §1, Session Laws of Alaska, 1951.

Appellants, who are all citizens of the United States, are neither citizens nor residents of Alaska. They operate canneries located on Puget Sound in the State of Washington. In order to obtain fish for their canneries, they send freezer ships equipped with brine-freezing and cold storage facilities to Alaskan waters each year during the salmon fishing season. The fish are caught close to shore with gillnets or seines handled by men in small shallow-draft catcher

boats. The appellants operate some of these catcher boats and others are operated by their owners under contract with the appellants. Most of these boats are transported to and from Alaska aboard the freezer ship, which acts as mother ship for their operations. The freezer ships also obtain fish by purchase from independent fishermen operating their own catcher boats.

The freezer ships stay in deep water, more than three miles from shore in the Bristol Bay area but closer to shore in the Kodiak Island and southeastern Alaska fishing areas. When a catcher boat has its catch, it returns to the freezer ship and unloads. The fish are immediately frozen in brine and stored. At the end of each season the freezer ships return to the canneries on Puget Sound where the fish are thawed and then canned.

The freezer ship tax as provided in Chapter 97, as amended, amounts to 4% of the value of the raw fish bought or otherwise obtained by freezer ships or other floating cold storages for processing through freezing. The trial court found that the tax applied to all fish obtained by appellants. *Territory of Alaska* v. *The Arctic Maid*, Alaska 1956, 140 F. Supp. 490.

Appellants contend that the trial court erred in so holding for the following reasons: (1) the tax is void because it is part of a taxing system which conflicts with the Constitution and with federal statutes; (2) the tax, because of the territorial limits of Alaskan jurisdiction, does not apply to fish taken on board the freezer ship when it is more than three miles from shore, even though the fish have been caught within the three-mile distance; and (3) appellants obtained their fish for canning, and therefore the tax does not apply to any of their operations as a matter of statutory interpretation because the statute taxes on the basis of fish obtained for freezing.

The case of one appellant, Northern Reefer Company, involves the additional question of the validity of a lien for

the taxes asserted by the Territory against the vessel Reefer II. This appellant was an innocent purchaser of the vessel after it had engaged in the operations for which tax is now claimed. The trial court upheld the lien.

I.

Appellants contend that the tax imposed on freezer ships is void because: (1) it is part of a tax system which discriminates against burdens and interstate commerce in violation of the commerce clause, Article I, §8 of the Constitution; (2) the separate tax classification of freezer ships and other floating cold storages is arbitrary and unreasonable, and is therefore in conflict with the equal protection clause of the 14th Amendment, the privileges and immunities clauses of Article IV, §2, and the 14th Amendment, the due process clauses of the 5th and 14th Amendments, and the White Act, 43 Stat. 464 (1924), 48 U.S.C. §222; and (3) the tax is a modification of the United States fish laws and therefore prohibited to the Alaskan legislature by the Organic Act of Alaska, §3, 37 Stat. 512 (1912), 48 U.S.C. §24.

The Alaskan statutes provide for these relevant taxes: A tax on salmon canneries, both shore-based and floating, of 6% of the value of the raw fish purchased or otherwise obtained for canning during the year;[1] and 1% of the

[1] Chapter 82, §1(a), Session Laws of Alaska, 1949, as amended by Chapter 113, §1, Session Laws of Alaska, 1951, reading as follows:

(a) Salmon canneries, both shore based and floating: An annual license tax equal to 6 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year.

value of the raw fish diverted for other purposes;[2] a tax on freezer ships and other floating cold storages of 4% of the value of the raw fish bought or otherwise obtained for processing through freezing;[3] and a tax on shore-based cold storages and all other fish processors, except salmon canneries and others not here relevant, of 1% of the value of the raw fish bought or otherwise obtained for processing through freezing, salting, or other method.[4] Although the

---

[2] Chapter 82, § 1(a)(1), Session Laws of Alaska, 1949, reading as follows:

(1) Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value.

[3] Chapter 97, § 1, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951, reading as follows:

(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resources bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished, etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

[4] Chapter 97, § 1(a), Session Laws of Alaska 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951, reading as follows:

(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the

value of the raw fish is not determined in the same way under these three statutes, little testimony was offered on this point, and none of it indicated that the relative amounts of tax were significantly affected by this difference. We shall therefore treat the statutory percentages as reflecting the relative impact of the taxes.

Appellants claim that the effect of the tax system is to hamper, burden and discourage the interstate movement of salmon prior to final processing. They point to these facts: The shore-based cold storages are taxed at 1% for freezing fish; the Alaskan canneries are taxed 1% for fish which they do not can and are not taxed for freezing fish which they later can; the appellants are taxed 4% for freezing fish. Even assuming that the tax on freezer ships is one affecting interstate commerce and therefore subject to the limitation of the commerce clause,[5] in our view this portion of the Alaskan tax system as applied to appellants does not discriminate against or unduly hamper the interstate movement of salmon prior to final processing. The shore-based cold storages freeze fish for the fresh-frozen consumer market; they are not in competition with appellants, who can all their fish. Fish frozen by a cannery but not canned are likewise not in competition with appellants' product. We see no significance in the fact that the Alaskan canneries do not pay a tax at the freezing stage on fish which they later can. This is only an illusory benefit, for such fish will be taxed at the 6% rate before they enter the market to compete with appellants' product. The same is

---

processor or offsets to the cash value for gear furnished, etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

[5] We do not decide the contested issue of whether the operation of the freezer ships in obtaining and freezing fish in Alaskan waters is in interstate commerce or a purely local operation. Compare *Oliver Iron Co.* v. *Lord*, 1923, 262 U.S. 172.

true of the fact that the Territory does not collect the 1% freezing tax from shore-based cold storages on fish which are later canned in Alaska, for these fish are likewise subject to the 6% canning tax before they enter the canned salmon market.

Appellants have urged us to consider three cases as principal support for their contention that the freezer ship tax is a burden on commerce: *Foster-Fountain Packing Co.* v. *Haydel*, 1928, 278 U.S. 1; *Toomer* v. *Witsell*, 1948, 334 U.S. 385; and *Memphis Steam Laundry* v. *Stone*, 1952, 342 U.S. 389. None of these cases are in point for in each case the court found that the statute in question was designed to and actually did operate in a discriminatory manner to discourage use of out-of-state competition and to encourage local industry. No such contention is made here.[6] We conclude that the tax as here applied does not discriminate against or burden interstate commerce so as to violate the commerce clause.

We also reject appellants' next contention that the separate tax classification of freezer ships is arbitrary and unreasonable. Freezer ships are different from the shore-based cold storages in that the former obtain their fish for canning while the latter obtain theirs for the fresh frozen consumer market. The legislature is free to differentiate between different industries, taxing one more heavily

[6] The statutes declared invalid were:

(a) A Louisiana statute prohibiting export of shrimp from the state before the heads and shells had been removed. *Foster-Fountain Packing Co.* v. *Haydel*, supra;

(b) A South Carolina statute requiring fish caught within the state to be unloaded, packed and stamped before being shipped out of the state. *Toomer* v. *Witsell*, supra;

(c) A Mississippi statute imposing a privilege tax on laundries not licensed in the state which solicited business therein. *Memphis Steam Laundry* v. *Stone*, supra.

than another.[7] Therefore it may tax the canned salmon industry more heavily than the fresh-frozen salmon industry.

It is equally clear that the freezer ships do compete in the same industry as the Alaska canneries. Unlike these competitors, they do not can their fish in Alaska. However, this difference is reflected in the substantially lower tax required of them as contrasted with that paid by the Alaskan canneries. Appellants have contended that certain ships which catch Alaskan salmon and preserve it by icing before carrying it elsewhere for canning, are not taxed at all. We have been unable to find any substantial evidence in the record that such ships are operating, and therefore reject this contention as not sustained by proof.

It is unnecessary to consider the applicability of the many cases bearing on the question whether arbitrary or unreasonable tax classifications violate the Constitution, since it appears that no arbitrary or unreasonable classification is present in this case. *State Board of Tax Commissioners* v. *Jackson*, 1931, 283 U.S. 527, 537.

This conclusion of fact likewise answers the argument of appellants that the freezer ship tax violates the White Act, 43 Stat. 464 (1924), 48 U.S.C. §222, by denying them as United States citizens the right to fish in areas where fishing is permitted by the Secretary of the Interior. Appellants do not contend that this Act grants them immunity from taxation by the Territory in the exercise of their fishing rights. Their argument is that the tax is discriminatory and therefore impairs their right to fish on a basis of substantial equality as guaranteed by the White Act. Since we have found that the freezer ship tax as here applied is

---

[7] *Quong Wing* v. *Kirkendall*, 1912, 223 U.S. 59; *Alaska Fish Co* v. *Smith*, 1921, 255 U.S. 44; cf. *State Board of Tax Commissioners* v. *Jackson*, 1931, 283 U.S. 527.

not unreasonable, arbitrary or discriminatory, we find that appellants are not prevented from exercising their fishing rights on a basis of substantial equality.[8]

Appellants next contend that the freezer ship tax is an attempt to modify the fish laws of the United States in violation of the Organic Act of Alaska, §3, 37 Stat. 512 (1912), 48 U.S.C. §24. That Act denies to the territorial legislature authority to alter, amend, modify or repeal, among others, the fish laws of the United States applicable to Alaska, except that "[t]his provision shall not operate to prevent the [Alaskan] legislature from imposing other and additional taxes or licenses." Appellants' contention is without merit. This is not a case in which fish regulation is attempted through the imposition of a prohibitive license tax on an unwanted activity.[9] The imposition by Alaska of reasonable taxes is clearly permitted by Congress.[10] We therefore find this tax to be valid.

II.

Appellants contend that the freezer ship tax is imposed on the operation of freezer ships and not on the act of taking fish. They conclude that they should be taxed only on those fish taken on board the freezer ships while they were actually within Alaskan waters. The trial court found that the taxable event was the taking of the fish from the waters of Alaska. The court therefore directed that the tax be paid on all fish obtained from Alaskan waters. This included fish obtained by company-operated catcher boats while their mother freezer ship was outside

[8] This is not a case of a revenue act so harsh that it amounts to a prohibition against fishing.' Compare *P. E. Harris & Co.* v. *Mullaney*, Alaska 1949, 87 F. Supp. 248.

[9] Compare *P. E. Harris & Co.* v. *Mullaney*, Alaska 1949, 87 F. Supp. 248.

[10] *Pacific American Fisheries* v. *Alaska*, 1925, 269 U.S. 269, 277; *Alaska Fish Co.* v. *Smith*, 1921, 255 U.S. 44.

such waters as well as fish purchased by the freezer ship outside Alaskan waters from independent catchers. The court reasoned that a contrary rule would permit evasion of Alaskan tax laws by the subterfuge of anchoring freezer ships outside Alaskan waters while those waters were being fished on behalf of the freezer ships by catcher boats.

We agree with the court below that freezer ships outside Alaskan waters which operate catcher boats within such waters must accept tax responsibility for the fish so obtained. Obtaining fish is an integral part of the operation of the freezer ship. The catcher boats operated by the freezer ship itself are but an extension of that ship's operations. If the extension operates within Alaskan waters, the freezer ship itself is operating within such waters and is subject to Alaska's tax jurisdiction.

However, we cannot agree that the freezer ships must pay Alaskan taxes on fish obtained within Alaskan waters by independent catcher boats but purchased by the freezer ships outside those waters. By this device freezer ship operators may reduce their liability for Alaskan taxes. However, Alaska cannot extend its taxes to nonresidents beyond its territorial jurisdiction in order to prevent such tax avoidance. The Territory is free to impose such taxes as it sees fit, within the limits set by the Constitution and federal legislation. By the same token, the freezer ship operators are free to arrange their operations so that the impact of such taxes upon them is minimized. Remaining outside the Territory is one method by which a nonresident may accomplish this purpose.

As to the catcher boats operated under contractual arrangements with appellants, the record does not reveal sufficient information about the nature of such arrangements to enable us to decide whether they should be regarded as extensions of the freezer ships. This question will be remanded for determination by the trial court.

The territorial limits of Alaska are defined by statute as those of the territory ceded by Russia to the United States by the treaty of March 30, 1867, 15 Stat. 539. Organic Act of Alaska, §1, 37 Stat. 512, 48 U.S.C. §21. That treaty placed the western boundary of the territory at a line running from the Bering Straits to the most western Aleutian island, thereby taking in most of the Bering Sea, including Bristol Bay. The United States at one time asserted regulatory power over seal fishing throughout this portion of the Bering Sea. An international dispute resulted, which was submitted to arbitration by the United States and Great Britain.[11] The arbitrators held that United States jurisdiction to regulate sealing in the Bering Sea did not extend beyond the ordinary limit of territorial waters, the three-mile limit.[12]

Since the United States had agreed in advance to abide by the award of the arbitrators,[13] this decision was held to result in a withdrawal to the ordinary three-mile limit of exclusive United States jurisdiction over waters of the Bering Sea. *La Ninfa*, 9 Cir. 1896, 75 F. 513. Because Bristol Bay is an arm of the Bering Sea, forming the southeast corner thereof, the three-mile limit for United States jurisdiction in the Bering Sea applies to much of Bristol Bay as well.

We do not agree with the Territory's contention that the freezer ship operators are liable for taxes on fish obtained outside the three-mile zone in Bristol Bay because Alaskan jurisdiction extends throughout the Bristol Bay fishing area as defined by the United States Fish and Wildlife Service.

---

[11] Arbitration was agreed upon in a convention between the United States and Great Britain, concluded February 29, 1892, 27 Stat. 947.

[12] 27 Am. Law Rev. 703 (1893).

[13] Convention between the Governments of the United States and Her Britannic Majesty, February 29, 1892, 27 Stat. 947, 951.

Bristol Bay is a portion of the Bering Sea which lies in the angle formed by the Alaskan Peninsula and the mainland to the north. Cape Newenham can be regarded as its northern headland, but its southern boundary, the Alaskan Peninsula, extends out into the Pacific Ocean much further than Cape Newenham and provides no clearly defined southern headland. The Fish and Wildlife Service defines the Bristol Bay area as follows:

> "The Bristol Bay area is hereby defined to include all territorial coastal and tributary waters of Alaska from Cape Newenham to a point on the coast 3 statute miles south of Cape Menshikof." 50 Code Fed. Reg. ¶104.1.

The distance between Cape Newenham and a point 3 miles south of Cape Menshikof is approximately 172 miles. The shortest distance between Cape Newenham and the Alaskan Peninsula is 165.5 miles and extends to a point 13.5 miles northeast of Cape Seniavin. It has been asserted that Bristol Bay includes the entire area between Cape Newenham and Cape Sarichef, a distance of approximately 290 miles. Bristol Bay is so large and so ill defined by geographical features that it is better described as a corner of the Bering Sea than as a separate body of water.

The Territory contends that Congress and the United States Fish and Wildlife Service have asserted United States jurisdiction beyond the three-mile limit in Bristol Bay. Congress by statute excludes non-United States citizens and non-residents of the "area embracing Bristol Bay and the arms and tributaries thereof" from stake-net and set-net fishing within the area. 43 Stat. 464 (1924) as amended, 48 U.S.C. §222a. As we have pointed out, the United States Fish and Wildlife Service has a regulation which defines the Bristol Bay fishing area.

The determination of territorial jurisdiction is a political and not a judicial prerogative. Courts are bound to accept

assertions of territorial jurisdiction made by Congress or the federal executive, acting within their authority.[14] However, we have carefully considered both the statute and the fishing area designation in the light of the arbitration award in the seal fishing dispute between the United States and Great Britain and the decision of this court in La Ninfa, supra, and are satisfied that neither constitutes an assertion of jurisdiction binding upon us.

What we have said concerning jurisdiction over Bristol Bay beyond the three-mile limit does not apply to Egegik Bay, Kvichak Bay and Nushagak Bay, all of which are regarded as arms and tributaries of Bristol Bay. The width of the entrance of Egegik Bay is less than six miles,[15] and although the width of Kvichak Bay and Nushagak Bay exceed ten miles at their entrances,[16] their locations and history place them within Alaskan jurisdiction.

In *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, [1877] L.R. 2 App.Cas. 394, the Privy Council in discussing whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was

---

[14] *In re Cooper*, 1892, 143 U.S. 472, 503; *Jones* v. *United States*, 1890, 137 U.S. 202; *La Ninfa*, 9 Cir. 1896, 75 F. 513.

[15] Bays six miles or less at the entrance are automatically included within the territorial limits of a nation by virtue of drawing a three-mile belt from each headland. Eg. *Manchester* v. *Massachusetts*, 1891, 139 U.S. 240, 257.

[16] In case of an indentation up to ten miles wide at the mouth, the lines across the entrance would mark the limits of inland waters and the marginal sea would extend three miles seaward of that line. In the case of an indentation wider than ten miles, the line shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles. Jessup, p. 356; A. L. Shalowitz, Legal-Technical Aspects of the Submerged Lands Cases; (Department of Commerce-U.S. Coast and Geodetic Survey 1954) pages 26-27.

part of the territory of Newfoundland and within the jurisdiction of its legislature, stated:

> "It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory . . ."

In considering the weight to be given historical claims, the court stated:

> ". . . the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

The United States and Alaska have exercised jurisdiction over these three smaller bays, and the claims of jurisdiction have not been challenged by any foreign government. In a geographical sense, they belong to Alaska, since they are part and parcel of it. In considering bays with headlands more than ten miles in width, the courts usually attach great importance to the historical claims and assertions of jurisdiction over a particular bay by the littoral sovereign as well as to whether there is a definite geographical relationship between the bay and such sovereign.[17]

---

[17] *People* v. *Stralla*, 14 Cal. 2d 617, 96 P. 2d 941 (1939); *Cunard Steamship Co.* v. *Mellon*, 1923, 262 U.S. 100. On the role of the courts in treating the problem of jurisdiction over bays, see Jessup, Law of Territorial Waters and Maritime Jurisdiction p. 355 et

The record before us does not specify the areas in which the fishing was done in Bristol Bay during the red salmon season. The statistics concerning the volume and money value of the catch by vessel relates to fishing north of Dixon Entrance (54° 40′ North Latitude). We have already found that much of this area is not within the jurisdiction of Alaska. However, there was testimony that the Arctic Maid was anchored between Egegik and the Nakinek River, and particularly between Middle Bluff and Red Bluff, when it received all or most of its fish from catcher boats operating within the three-mile limit during the Bristol Bay red salmon season. The bays within and adjacent to this area are all within the jurisdiction of Alaska.

In view of the unsatisfactory record before us as to the precise location in Bristol Bay and its tributaries in which the freezer ships operated and the absence of information as to the volume and value of the catches during such periods, these facts must also be determined by the trial court upon the remand of this case.

III.

Appellants contend that the statute, by its own terms, does not apply to their operations. The statute taxes on

---

seq. (1927), and I Hyde, International Law §§ 146 et seq. (1945). Professor Hyde, at Page 473, states:

> "The coast of Alaska is indented by certain bays of broad dimensions which by reason of their relation to the land appear to belong in a geographical sense to the sovereign thereof."

Included among such bays are Bristol Bay inside of a line drawn from Igagik (also spelled Egegik) to Protection Point. He states:

> "They are water areas which, regardless of the distance between headlands, it is believed that the United States may formally claim to be its own without violating any requirement of international law."

The line of which he speaks is immediately adjacent to Nushagak Bay and Egegik Bay, and at most is just a few miles from the entrance of Kvichak Bay.

the basis of the value of the raw fish resource "bought or otherwise obtained for processing through freezing." [18] Appellants assert that although they froze all their fish, this was not the purpose for which the fish were obtained. They were all obtained for processing through canning, and the freezing was merely a temporary measure to preserve the fish until they could be brought to the canneries at Puget Sound.

We agree with the court below that the freezer ship tax applies to appellants. It is apparent from both the preamble[19] and the body of the statute that the legislature intended to tax freezer ships. During the years in question and the time the statute was enacted, the only freezer ships which operated in Alaskan waters were those which obtained their fish for canning. There can be little doubt that the legislature intended to cover operations like those of the appellants when it enacted the freezer ship tax. While the statute is not a model of clarity, we think it clear and broad enough to accomplish this legislative purpose. We therefore reject appellants' narrow construction which would result in frustrating that purpose.

Appellants assert that the Alaska Department of Taxation has itself accepted their interpretation of the phrase "bought or otherwise obtained for processing through freezing." This claim is based on testimony of a Department of Taxation enforcement officer that shore-based cold storages for freezing fish which are later canned in Alaska are not taxed even though a somewhat similar phrase prescribes the tax liability of shore-based cold

---

[18] Chapter 97, § 1(b), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951. The text of the section is set out in footnote 3 supra.

[19] Chapter 116—An Act Amending Section 1 of Chapter 97, Session Laws of Alaska, 1949 imposing a license tax on freezer ships and other floating cold storages and declaring an emergency.

storages.[20] The Department does collect the six per cent canning tax on such fish. Such testimony, even if it represented the official views of the Department of Taxation, does not support appellants' interpretation that freezing of salmon which are ultimately canned is not taxable under a statute which taxes fish obtained "for processing through freezing." A more plausible explanation is that the Department has construed the Alaskan statutes to require imposition of only the highest applicable Alaskan processing tax on fish processed by more than one taxable method. In any event, we believe that the freezer ship tax is applicable to the appellants.

IV.

The final question concerns the validity of the lien asserted by the Territory against the freezer ship Reefer II, presently owned by appellant Northern Reefer Company. The lien was claimed for taxes due as a result of the operations of the Reefer II by the Grimes Packing Company, its then owner during 1952. Under the statute, an initial fee of $25.00 is required before a ship is operated during any year, with payment of the total fees owing as a result of the year's operation to be made by January 15th of the following year. The Grimes Packing Company paid neither the initial nor final fees. Subsequent to January 31, 1953, the ship was sold to Northern Reefer Company by the estate of O. L. Grimes, sole proprietor of the Grimes Packing Company, for value and without notice of any lien on the vessel. The Alaska Tax Commissioner was unaware of the death of Grimes and the transfer of the vessel. He, therefore, made no claim against Grimes' estate for the taxes now alleged to be due.

---

[20] Chapter 97, § 1(a), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951. The text of the section is set out at footnote 4 supra.

The lien against the Reefer II is claimed under the following provision:

> "Liens. All taxes levied or provided or accruing under the provisions of this Act, and the penalties and interest thereon are hereby declared to be a lien prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the business . . . ." [21]

The appellant contends that the lien under this statute does not actually attach to the property until the tax is assessed by the Tax Commissioner, and since the tax was not assessed until after appellant's innocent purchase of the vessel, the asserted lien is invalid.

Appellant failed to raise this contention at the trial stage, and appellee urges that we refuse to consider it now. Since this case must be remanded to the District Court to determine other issues, we remand it also for a determination of the validity of the lien in the light of appellant's new contention.

Conclusion

We hold the freezer ship tax to be valid as to all fish obtained by appellants' freezer ships within three miles of Alaskan shores and within such other Alaskan waters as are within the jurisdiction of the United States. Bristol Bay, or the greater portion thereof beyond the three-mile zone, is not within the jurisdiction of the United States, but Egegik Bay, Kvichak Bay and Nushagak Bay, which are

---

[21] Chapter 82, § 4(h), Session Laws of Alaska, 1949, made applicable by Chapter 97, § 4, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951.

tributaries of Bristol Bay, are all within the jurisdiction of the United States.

The tax on fish obtained within Alaskan jurisdiction by catcher boats operated by appellants is valid, but no tax may be levied upon fish obtained by freezer ships outside Alaskan jurisdiction from independent fishermen even though the independent fishermen caught the fish in waters within Alaskan jurisdiction.

The record before us as to the periods in which the freezer ships operated within Alaskan jurisdiction and the volume and value of the catches during such periods is insufficient to enable us to determine the amount of taxes which are attributable to such operations. The case is therefore remanded to the District Court to make that determination.

This record is also insufficient on the status of the contract catcher boats. The trial court is directed to determine whether the operators of these catcher boats were independent contractors or employees of appellants.

The judgment is vacated and the case remanded for a redetermination of the tax in accordance with this opinion and for a re-examination of the validity of the tax lien asserted against the Reefer II.

(Endorsed:) Opinion. Filed Mar. 16, 1959.

Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,284

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,285

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,286

ALASKA REEFER and ALASKA REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,287

NORTH STAR and NORTH STAR FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,288

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

Mar. 23, 1960

Appeals from the United States District Court for the District of Alaska, First Division

Before: Chambers, Chief Judge, and Stephens, Pope, Barnes, Hamley, Hamlin, Jertberg, Merrill, and Koelsch, Circuit Judges.

HAMLEY, Circuit Judge:

These actions were brought by the Territory of Alaska to recover unpaid license taxes incurred in the operation of freezer ships during the years 1951 through 1954. The partnerships and corporation which were named defendants denied liability. Four of them counterclaimed to recover taxes which they had paid.[1] The actions were consolidated for trial.

Judgment was entered for Alaska and against each defendant, the total award being $116,731.53. In support of this judgment the trial court filed an opinion containing

[1] The defendants are as named in the title of this action. The counterclaims were filed by Arctic Maid, Pacific Queen, Alaska Reefer, and North Star.

findings of fact and conclusions of law in addition to a discussion of the issues. Territory of Alaska v. The Arctic Maid, 140 F. Supp. 190. In an unreported supplemental opinion thereafter filed there is further discussion of some of the issues.

Defendants have joined in this appeal. They raise a number of questions relating to the construction of the taxing statute, the territorial jurisdiction of Alaska over the business activity in question, and the validity of the tax, as applied, under certain constitutional and statutory provisions. Two of the defendants, Northern Reefer Company and Grimes Packing Company, present an additional question relating to the enforceability of a tax lien asserted against the freezer ship Reefer II.

The appeal was originally argued before a court consisting of two circuit judges and one district judge. After an opinion had been filed by the court as so constituted a rehearing en banc was granted. The previously entered opinion is hereby withdrawn and this opinion by the court en banc is entered in substitution therefor.

The facts necessary to be considered are not in dispute. Appellant Arctic Maid is a Washington corporation not qualified to do business in Alaska. The remaining appellants are partnerships, all members of which are residents of either the State of Washington or the State of California, and all are citizens of the United States. None of the copartners resides in Alaska. All of the appellants operate canneries located on Puget Sound in the State of Washington. In order to obtain fish for their respective canneries they each send freezer ships to the waters adjacent to Alaska each year during the salmon season.

The freezer ships are vessels equipped with refrigeration and storage facilities for the freezing, storage, and transportation of fish. They are also equipped to provide transportation facilities for fishermen, and food and

quarters for fishermen during the Alaska fishing season. In addition these freezer ships provide means for transporting "catcher" boats from Puget Sound to Alaskan fishing waters and back again at the end of the fishing season.

The fish are caught from the catcher boats, and are then transferred to the freezer ships. These catcher boats are of a general type commonly known as "Bristol Bay gillnetters." They are gas-powered vessels about thirty to thirty-two feet in length.

In most instances these gillnetters are owned by appellants and are transported from and returned to Puget Sound aboard the freezer ships. In some cases gillnetters owned by appellants are not transported to and from Puget Sound, but are stored ashore in the Bristol Bay area. In other instances appellants have contracted with others owning gillnetters to catch fish for the freezer ships during the salmon season.

The gillnetters are manned by fishermen—two to each boat—employed each season by appellants under the terms of the current Bristol Bay agreement between the salmon industry and the Alaska Fishermen's Union.[2] In addition to obtaining fish through the use of gillnetters owned by or operated under contract with appellants, fish are also purchased from independent fishermen and taken aboard the freezer ships.

The freezer ships are utilized primarily in connection with the Bristol Bay red salmon season. They anchor seaward of a line drawn parallel to and at a distance of

[2] In broad outline the terms of employment of the fishermen provide that the defendants supply the gillnetters and all gear, pay the current seasonal price for the salmon caught and delivered to the freezer ships, provide food and quarters aboard the "mother ship," pay "run money" in the amount of $234 per man, furnish air transportation in one direction if desired by the fisherman, and provide fuel for the operation of the gillnetter.

three miles from mean low tide mark on the shore of Bristol Bay and serve as a base for the operations of the gillnetters.

The gillnetters leave their respective freezer ships at the beginning of each open period during the fishing season and proceed to the fishing areas inshore. They traverse this inshore water, searching for fish, and return periodically to their freezer ships. The fish which have been caught are then transferred to the freezer ships by means of a net suspended from a boom. As the fishermen throw the fish into the net the fish are tallied by the crew of the freezer ship. The fishermen's pay is based upon the number of fish so tallied.

During some of the years here in question some of the appellants operated their freezer ships at other times or in other areas than during the Bristol Bay red salmon season. For example, freezer ships were sometimes utilized in the Bristol Bay king salmon season, or in the Kodiak, Cook Inlet, or Southeastern Alaska areas. During these operations, as distinguished from the Bristol Bay red salmon season, the freezer ships were operated at points closer to shore than three miles and obtained fish from catcher boats while so positioned.

When fish are taken aboard the freezer ships from the gillnetters owned or operated under contract by appellants, or after purchase from independent fishermen, they are dumped into quick-freezing brine tanks. The freezing begins immediately and continues over a period of ten to twelve hours. During this time the brine in the tank is constantly changed and circulated. At the end of ten to twelve hours the temperature of the fish has been lowered to twelve to fifteen degrees and they are fully frozen.

Traps in the bottom of the brine tanks are then opened and by means of a chute the fish are directed into the refrigerated hold where they are stored until discharged

at destination on Puget Sound. The brine tanks themselves are sometimes used for the storage of fish.[3]

At the conclusion of the operations in waters adjacent to Alaska appellants take on board the gillnetters which had been transported from Puget Sound on the freezer ships. Appellants then return these freezer ships to Puget Sound and discharge the frozen fish at their respective canneries. During the years in question all but five hundred pound of the frozen fish so transported to Puget Sound were canned there by appellants.

The Alaska license tax here in question has its genesis in Session Laws of Alaska 1949, chapter 97. Under this 1949 statute a one-per-cent annual license tax was imposed upon persons, firms, or corporations prosecuting certain lines of business. The specified lines of business were "cold storage and other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: . . ." It was provided that the annual tax would be equal to one per cent of the value of the fish ". . . bought or otherwise obtained for processing through freezing, salting or other method."

It will be observed that in so far as cold storages are concerned no distinction was drawn in the 1949 statute between shore-based plants and freezer ships or other floating cold storages. All were to be taxed at the rate of one per cent of the value of the raw fish.

Such a distinction was drawn in 1951, however, when the territorial legislature enacted chapter 116, amending chapter 97, Sess. Laws Alaska 1949. In the 1951 enactment the lines of business to be taxed were divided into two

[3] During the 1951 season the freezing method employed aboard the vessel Pacific Queen was the so-called "air-blast" method. Under this method the fish are placed in racks and set into a freezing compartment where they are subjected to blasts of air at a sub-freezing temperature until fully frozen.

groups. The first, consisting of "shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: . . . ," were taxed at the 1949 rate of one per cent. The second group, consisting of "freezer ships and other floating cold storages," were taxed at the rate of four per cent.[4]

---

[4] Sess. Laws Alaska 1951, chapter 116, reads as follows:

"Section 1. Section 1 of Chapter 97, Session Laws of Alaska 1949, is hereby amended to read as follows:

"Section 1. BUSINESS IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

"(a) Shore based cold storages and all other fish processors except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

"(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned

In 1949 Alaska also imposed a four-per-cent license tax on salmon canneries, both shore-based and floating (Sess. Laws Alaska 1949, ch. 82). This tax was raised to six per cent in 1951. Sess. Laws Alaska 1951, ch. 113, Alaska Comp. Laws, Cum. Supp. 1958, § 35-1-91.[5] Also in 1949 Alaska imposed a five-dollar annual license fee for resident commercial fishermen who take fish from the fishery resources of Alaska, and a fifty-dollar annual license fee on nonresident commercial fishermen engaged in the same activity. Sess. Laws Alaska 1949, ch. 66. This tax was thereafter declared invalid. Anderson v. Mullaney, 9 Cir., 191 F. 2d 123, affirmed sub nom. Mullaney v. Anderson, 342 U. S. 415.

One of the contentions made by appellants on this appeal is that the tax in question, as applied, imposes an undue burden on and discriminates against interstate commerce, and is an attempted regulation of interstate commerce, all in violation of Article I, section 8, of the Constitution. If this contention is well founded, it is dispositive of the entire case, since the tax would then be wholly invalid and unenforceable. We therefore proceed at once to a consideration of this question.

In asserting that the freezer-ship tax here in question is invalid under the Commerce Clause, appellants advance two arguments. The first is that the activity sought to be taxed is an inseparable part of interstate commerce and so is not subject to any state or territorial privilege tax.

---

which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval."

[5] This tax was computed on a somewhat different basis than the tax on shore-based cold storages and freezer ships and other floating cold storages, but the difference is immaterial for present purposes.

The second is that the statute, as enacted and administered, discriminates against the interstate transportation of salmon caught in Alaskan waters for canning outside of Alaska and in favor of the canning of such salmon within Alaska.

In dealing with either of these arguments it is first necessary to determine what business activity was intended to be taxed. Part of the activity of freezer ships, including at the very least the moving of the vessels to and from Bristol Bay and Puget Sound, occurs beyond the territorial jurisdiction of Alaska. If the tax is intended to include this extraterritorial activity of freezer ships, the tax is invalid—not under the Commerce Clause, but under the Due Process Clauses of the Fifth and Fourteenth Amendments.[6]

But, despite the broad language of chapter 116 in taxing the prosecution of the "line of business" of freezer ships, we are unwilling to believe that the legislature intended to impose such a clearly unconstitutional tax. Where a statute is reasonably susceptible of two constructions, that construction will ordinarily be accepted which avoids invalidation on a constitutional ground.[7]

Under all of the facts it is reasonable to assume that the freezer-ship activities which the territorial legislature had in mind and intended to tax did not include any which occurred while the freezer ships were beyond territorial waters.

A serious question is raised on this appeal as to whether the freezer ships while at anchor beyond the three-mile limit in Bristol Bay were in territorial waters. For the purpose of considering the Commerce Clause question we

[6] Miller Bros. Company v. Maryland, 347 U.S. 340, 342; Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83; International Paper Co. v. Massachusetts, 246 U.S. 135, 141.

[7] United States v. Witkovich, 353 U.S. 194, 201; Singer Sewing Machine Co. v. Brickell, 233 U.S. 304.

will assume that they were. It follows under this assumption that all activities of the "line of business" of freezer ships, carried on while the freezer ships were at anchor, were subject to Alaskan tax jurisdiction unless precluded by the Commerce Clause.

The question remains, however whether chapter 116 was intended as a tax on all activity while the freezer ships were at anchor. The prime activity was the freezing and cold storage of fish preparatory to transporting the fish in interstate commerce for canning elsewhere. But, as an integrated part of the business of operating freezer ships, catcher boats owned or under contract to appellants were utilized in the catching of fish which were then taken aboard the freezer ships.

The trial court held that chapter 116 was not intended as a tax upon the activity of the freezer ships in freezing fish and maintaining the fish in cold storage. Rather, that court held, the only activity of freezer ships intended to be taxed under that chapter was the one of taking fish in territorial waters through utilization of catcher boats owned by or under contract to appellants.

In our opinion, however, the catching of fish is not the tax incident or a part of the tax incident contemplated by §1(b) of chapter 116, taxing freezer ships. As therein provided, the tax is four per cent of the value of raw fish "bought or otherwise obtained for processing through freezing." The tax therefore applies whether or not the fish are caught by gillnetters owned by or under contract to appellants. The emphasis in the quoted statutory words is on the purpose of acquisition—not the manner of acquisition. The purpose which gives rise to the tax is "processing through freezing."

Thus it is the freezer-ship activity of processing through freezing which is taxed. The value of raw fish bought or otherwise obtained is referred to only in specifying the

method of computing the tax. Likewise, under section 1(a) of chapter 116 the shore-based cold-storage activity which is taxed is that of "processing through freezing," whether the fish are acquired by purchase or otherwise.[8] Similarly, under Sess. Laws Alaska 1951, chapter 113, the salmon cannery activity which is taxed is that of "canning," whether the raw fish are "purchased or otherwise obtained."[9]

In concluding that the only activity here being taxed is the taking of fish, the trial court likened Sess. Laws Alaska 1951, chapter 116, to the taxing statutes which were upheld in Toomer v. Witsell, 334 U. S. 385, and Oliver Iron Mining Co. v. Lord, 262 U. S. 172.

In Toomer nonresident owners of commercial shrimp trawlers resisted a South Carolina tax of one-eighth cent a pound on green, or raw, shrimp taken within three miles of the coast of that state.[10] In holding that the tax was

---

[8] The testimony is undisputed that shore-based cold storages do not use catcher boats of their own. It also appears probable, though the evidence is not explicit on this, that much of the troll-caught fish used by shore-based cold storages are caught on the high seas. Hence, if the license tax on shore-based cold storages, which (except for the rate of tax) is to be computed in the same manner as for freezer ships, is deemed to be a tax on the catching of fish, Alaska is taxing shore-based cold storages on an extraterritorial activity of independent fishermen.

[9] Should it be held that the activity taxed under these three provisions is or includes the catching of fish, a grave due process question would be presented. This arises from the fact that the territorial legislature would then be chargeable with placing in one class and taxing the catching of fish by the use of boats owned by or operated for freezer ships, while placing in another class and not taxing the catching of fish by independent fishermen.

[10] The South Carolina statute provided:

"The following fisheries' tax is hereby imposed upon all fish or fisheries products taken or canned, shucked or shipped for market, to-wit . . . on each pound of green shrimp, one-eighth of one cent. . . ."

not invalid under the Commerce Clause, the court stated that the taxable event was the taking of shrimp.

Since the only activity involved in Toomer was that of operating commercial shrimp trawlers, the taxable event was necessarily the catching of shrimp. Here, however, the activity named in the taxing statute is that of operating freezer ships, the prime functio of which is the freezing of fish. The holding in Toomer, that the taxable event there in question was the taking of fish, therefore provides no guidance which is helpful here.

We reach the same conclusion with respect to Oliver Iron Mining Co. v. Lord, supra, also relied upon by the trial court. In that case a six-per-cent occupation tax was levied upon "every person engaged in the business of mining or producing iron ore or other ores in this state . . . ." It was provided that the tax would be equal to six per cent of the valuation of the ore mined or produced. In upholding the tax against a Commerce Clause challenge the court stated that the tax was levied on the business of mining ore. Since the only activity there in question was the mining of ore, the court's conclusion as to the taxable event necessarily followed.

We hold that the only tax incident defined in chapter 116 is the freezing and cold storage of fish aboard freezer ships while the ships are at anchor in what we, for present purposes, assume to be territorial waters.

As before noted, it is one of appellants' contentions under their Commerce Clause point that this activity is an inseparable part of interstate commerce and so is not subject to any privilege tax, whether or not discriminatory.

The basic premise of this argument is established law. A state may not lay a tax on the "privilege" of engaging

in interstate commerce.[11] Where this is the nature of the tax the Commerce Clause forbids its imposition, whether or not discriminatory and regardless of the amount of the tax or the method of computation.[12] Likewise, the fact that the taxpayer has received benefits through local conservation measures is immaterial. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 163-164.

It is to be noted that the cases draw a clear distinction between the privilege taxes and state exactions taking the form of compensation for the use of highways, collections in lieu of an ad valorem property tax, inspection fees, taxes on sales or use, excise or privilege taxes on activities before interstate commerce begins and after it ends, or fairly apportioned net income taxes. All of the latter may be the subject of nondiscriminatory state or local impositions.[13] But the right to engage in interstate commerce is not a privilege conferred by state or local government, and may not be taxed as such.

The critical question, then, is whether the activity of freezing and cold storing fish, engaged in by freezer ships while lying at anchor in territorial waters preparatory to transporting such fish to the State of Washington for canning, is an inseparable part of interstate commerce. If so, any territorial privilege tax thereon is forbidden by the Commerce Clause.

The freezing and cold-storage activity in question is a "local" activity in the sense that under the assumptions

---

[11] Northwestern States' Portland Cement Co. v. Minnesota, 358 U.S. 450, 458; Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 610; Joseph v. Carter & Weekes Co., 330 U.S. 422, 433; McGoldrick v. Berwind-White Co., 309 U.S. 33, 48.

[12] Spector Motor Service, Inc. v. O'Connor, supra, p. 607; Joseph v. Carter & Weekes Co., supra, p. 433.

[13] Northwestern Cement Co. v. Minnesota, supra, pp. 458-459; Spector Motor Service, Inc. v. O'Connor, supra, p. 607; McGoldrick v. Berwind-White Co., supra, p. 47.

here made it takes place within Alaskan territorial jurisdiction. This is true of most interstate commerce activity. The individual phases thereof take place within the boundaries of one state or another, except, as in this case, where part of the transportation is on the high seas. But if such local activity is of a kind which cannot be separated from the interstate process, the flow of commerce, it must be regarded as an integral part of interstate commerce. Michigan-Wisconsin Pipe Line Co. v. Calvert, supra, p. 166.

In determining whether the activity here in question can be separated from the interstate process, the flow of commerce, the case of Joseph v. Carter & Weekes Co., supra, provides helpful guidance. In that case a nondiscriminatory municipal excise tax on the gross receipts of a stevedoring company engaged in loading and unloading vessels moving in interstate and foreign commerce was declared invalid under the Commerce Clause. In holding that such a tax is not apportioned to income derived from activities within the taxing state, the court stated (at pages 427-428):

> "The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself."[14]

The activity being taxed in our case, the freezing and cold storage of fish engaged in by the line of business of freezer ships, takes place after the fish are loaded on the vessel

[14] see, also, Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 83, where the court said: ". . . the commencement of the export would occur no later than the delivery of the oil into the vessel." In Michigan-Wisconsin Pipe Line Co. v. Calvert, supra, the activity sought to be taxed included processing after the product, natural gas, had passed into the facilities of the interstate carrier. The tax was declared invalid under the Commerce Clause.

which is to transport them in interstate commerce. Thus, applying the "loading and unloading" test of the Joseph and Richfield Oil Corporation cases, supra, this freezing and cold-storage activity takes place after the flow of interstate commerce has begun, and is therefore an integral part of such commerce.

But, apart from the somewhat mechanical test of whether the activity takes place with or after loading on the interstate vehicle, the rationale of the Joseph decision calls for the same conclusion. In that case loading of cargo on the interstate carrier was held to be an activity in interstate commerce because it involved the transportation vehicle itself and was preliminary to and an essential part of the safety and convenience of that transportation. Likewise here, the freezing and cold-storage activity takes place after the fish are loaded on the interstate carrier and is preliminary to and an essential part of the transportation itself. This freezing and cold storage is solely for the purpose of preserving the fish so that they may be so transported, such transportation being otherwise impossible.

Appellants make no contention that the activity of catching fish in Alaskan waters would not be amenable to a nondiscriminatory local privilege tax. Toomer v. Witsell, supra, establishes that such an activity may be taxed. See, also, Anderson v. Mullaney, supra, page 129. But where, as here, the processing activity constituting the tax event occurs subsequent to loading the product on the interstate carrier and is indispensable to such transportation, any local privilege tax thereon is forbidden by the Commerce Clause.

The judgment is reversed and the cause is remanded with directions to enter judgment for appellants on the tax claims, and to adjudicate the counterclaims.

(Endorsed) Opinion Filed Mar. 23, 1960.

Frank H. Schmid, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

Judgment

APPEAL from the District Court for the Territory (now State) of Alaska, First Division

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court for the Territory (now State) of Alaska, First Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee, and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment for the appellants on the Tax claims, and to adjudicate the counterclaim.

IT IS FURTHER ORDERED and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

(Endorsed) Judgment. Filed and entered March 23, 1960

FRANK H. SCHMID, *Clerk*

APPENDIX C

Section 1, Chapter 82, SLA 1949:

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

"(a) Salmon canneries, both shore based and floating: An annual license tax equal to 4 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year.

"(1) Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value.

"(b) Herring processing plants in the business of canning, curing, salting, freezing or making meal or oil or other processed product including sale of bait herring by either processing plant or bait herring fisherman: An annual license tax equal to 1 percent of the value of the raw herring. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or off-

sets to the cash value for gear furnished etc. Such value shall apply to herring caught in company owned or subsidized boats operated by employees of the processor or under lease or other agreement.

"(c) Crab canneries, both shore based and floating: An annual license tax equal to 2 percent of the value of the raw crabs. The raw crab value for the purpose of this license shall be the actual price paid for same either by cash or its equivalent according to the provisions above set forth for herring processing plants.

"(d) Clam canneries: A license tax equal to 2 percent of the value of the raw clams, with value to be determined according to the provisions above set forth for crab canneries will be levied on razor clams.

"(1) Butter clams shall be taxed in the same manner at the rate of 1 percent of the value of raw clams."

APPENDIX D

Section 1, Chapter 97 SLA 1949:

"Section 1. Businesses in Alaska Fisheries Requiring Licenses: Amounts Thereof. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following licenses [license] taxes which are hereby levied:

"(a) Cold storage and other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material

under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement."

APPENDIX E

Chapter 113, SLA 1951:

"To amend Chapter 82, Session Laws of Alaska 1949, relating to a license tax on salmon canneries; and declaring an emergency.

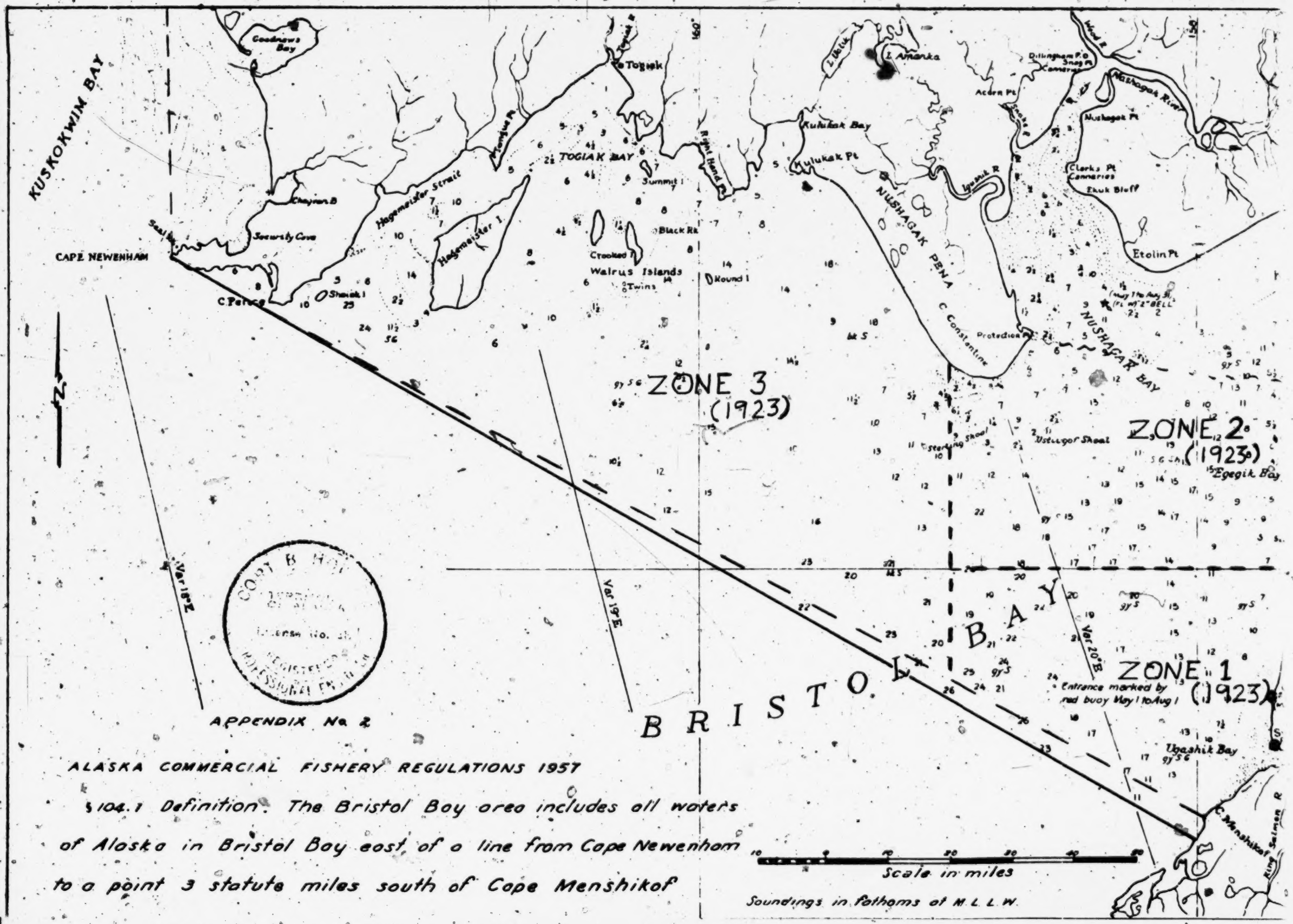
"Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Subsection (a) of Section 1 of Chapter 82, Session Laws of Alaska 1949, is hereby amended to read as follows:

"(a) Salmon canneries, both shore based and floating: An annual license tax equal to 6 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year."

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

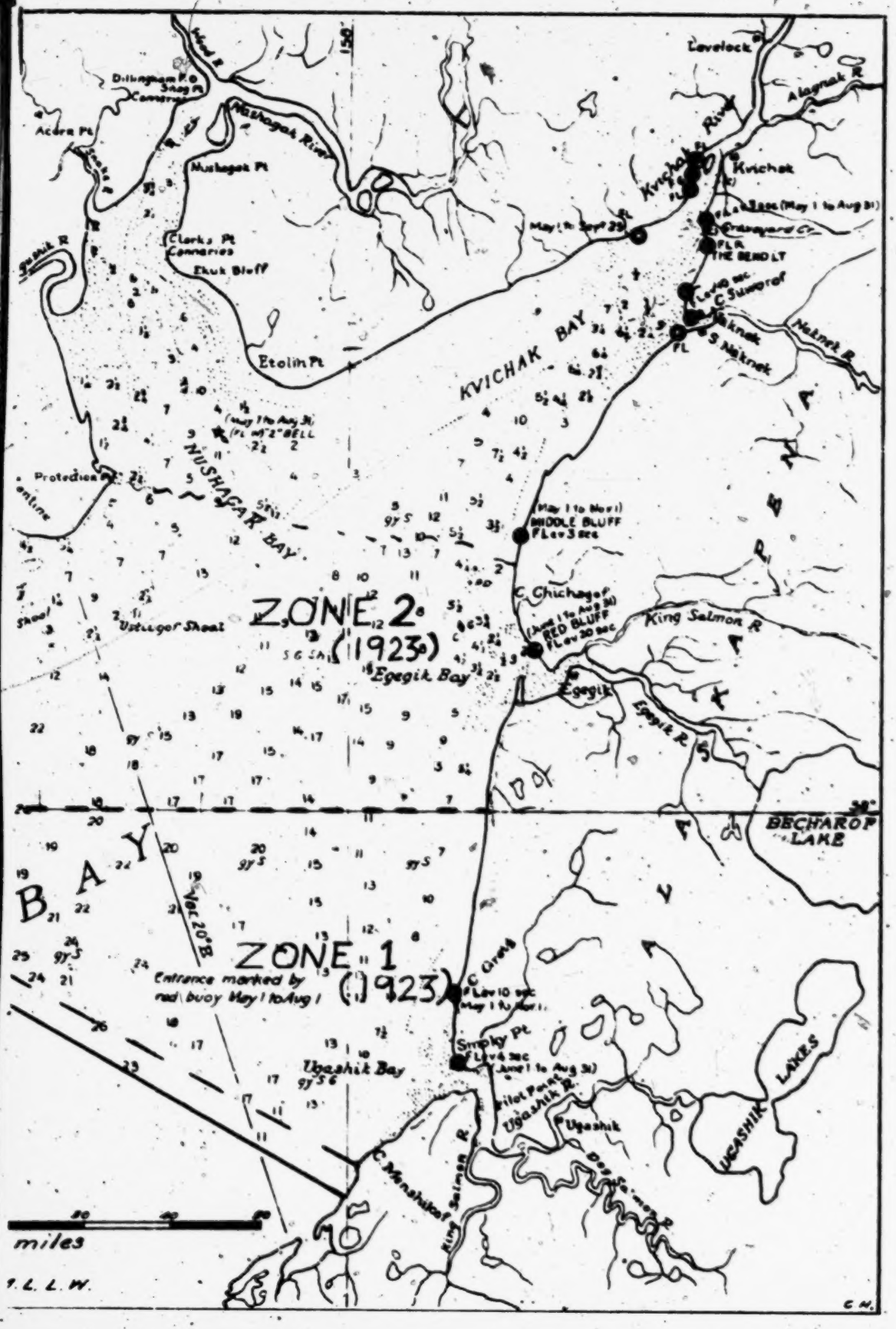
"Approved March 24, 1951."



APPENDIX No 2

ALASKA COMMERCIAL FISHERY REGULATIONS 1957

§104.1 Definition. The Bristol Bay area includes all waters of Alaska in Bristol Bay east of a line from Cape Newenham to a point 3 statute miles south of Cape Menshikof


Dillingham P O
Shag Pt
Cannery
Acora Pt
Nushagak River
Nushagak Pt
Clarks Pt
Cannaries
Ekuk Bluff
Etolin Pt
Protection Pt
entine
NUSHAGAK BAY
Shoal
Ustiugof Shoal
ZONE 2
(1923)
Egegik Bay
B A Y
Var 20° E
ZONE 1
(1923)
Entrance marked by
red buoy May 1 to Aug 1
Ugashik Bay
C Menshikof
Ugashik R
Pilot Point
Ugashik
Ugashik Lakes
Dog Salmon R
Egegik R
Egegik
King Salmon R
C Chichagof
(June 1 to Aug 31)
RED BLUFF
FL ev 20 sec
(May 1 to Nov 1)
MIDDLE BLUFF
FL ev 3 sec
KVICHAK BAY
S Naknek
Naknek R
Naknek
FL
Kvichak River
Kvichak
Lovelock
Alagnak R
Graveyard Cr
FLR
THE BEND LT
C Sumnerof
Becharof Lake
C Greek
Simpky Pt
FL ev 4 sec
(June 1 to Aug 31)
FL ev 10 sec
(May 1 to Nov 1)
miles
M. L. L. W.
C. H.

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 15 1960
JAMES R. BROWNING, Clerk

BRIEF ON MERITS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

STATE OF ALASKA, *Petitioner*,

v.

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

ALASKA REEFER and ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTH STAR and NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

RALPH E. MOODY
Attorney General of Alaska
430 Capitol Building
Juneau, Alaska

GARY THURLOW
Deputy Attorney General
430 Capitol Building
Juneau, Alaska

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement	5
Summary of Argument	9
Argument	10
I. The incidence of the tax is on the carrying on of any part of a freezer ship business that occurs within Alaskan waters and is not on the "Freezing of Fish"	10
II. Freezer ships, in taking and processing fish by freezing, are not engaged in interstate commerce, but are instead engaged in business of a local nature	14
III. Any attempt by Alaska to correct the discriminatory effect of the exemption of freezer ships operations from state taxation would require a drastic change in the social, economic, and political approach to taxation in Alaska	23
Conclusion	25
Appendix A—Opinion of Ninth Circuit Court of Appeals dated March 16, 1959	1a
Appendix B—Section 1, Chapter 82, SLA 1949	19a
Appendix C—Section 1, Chapter 97, SLA 1949	21a
Appendix D—Chapter 113, SLA 1951	22a
Appendix E—Map of Bristol Bay, Alaska	23a

CITATIONS

Cases:

Coe v. Errol, 116 U.S. 517 (1886)	23
Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939)	12
Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922)	23

Page

Home Insurance Co. v. New York, 134 U.S. 594, 600 (1890) 11
Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) .. 23
Joseph v. Carter & Weekes Co., 330 U.S. 422 (1947) 8, 17, 20
La Coste v. Department of Conservation, 263 U.S. 545 (1924) 23
Mich.-Wis. Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 15, 16, 20
Oliver Iron Co. v. Lord, 262 U.S. 172 (1923) 21, 22, 23
Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946) 8, 15, 18, 19, 20
Territory of Alaska v. The Arctic Maid, 140 F. Supp. 190 (Alaska 1956) 8
Toomer v. Witsell, 334 U.S. 385 (1948) 21, 22, 23

STATUTES:

Act of June 14, 1906, c. 3299, 34 Stat. 263, 48 U.S.C., §§ 244-247 13
Act of June 26, 1906, c. 3547, 34 Stat. 478, 48 U.S.C., §§ 230, 231, 235-239, 241, 242 13
Act of June 6, 1924, c. 272, 43 Stat. 464, 48 U.S.C., §§ 225-228 13
Act of July 7, 1958, 72 Stat. 339 13
38 U.S.C., § 1254(1) 2
28 U.S.C., § 1291 2
28 U.S.C., § 1294(2) 2
Section 1, Chapter 82, Session Laws of Alaska 1949 ..... 5, 6
Section 1, Chapter 97, Session Laws of Alaska 1949 ..... 5, 7, 10, 14
Section 1, Chapter 113, Session Laws of Alaska 1951 ..... 5, 7
Section 1, Chapter 116, Session Laws of Alaska 1951 ..... 3, 7

MISCELLANEOUS:

Paul J. Hartman, State Taxation of Interstate Commerce (1953 ed.) at p. 113 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

STATE OF ALASKA, *Petitioner*,

v.

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

ALASKA REEFER and ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTH STAR and NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the District Court for the Territory of Alaska, Division Number One, at Juneau, entered March 17, 1956, is reported at 140 F. Supp. 190 (R.

60) and a supplemental opinion of that Court entered May 25, 1956, is set forth at page 82 of the Record. The opinion of the United States Court of Appeals for the Ninth Circuit, dated March 16, 1959, is unreported and attached to this Brief as Exhibit "A". The opinion of the Ninth Circuit Court of Appeals, dated March 23, 1960, superseding the earlier decision of March 16, 1959, is found at 277 F. 2d 120 (R. 380).

JURISDICTION

The judgment of the District Court for petitioner was entered by the District Court on May 25, 1956 (R. 87). These cases were then appealed by respondents to the United States Court of Appeals for the Ninth Circuit under Title 28, United States Code, Sections 1291 and 1294(2) and were heard by a division of that Court. On March 16, 1959, the Ninth Circuit Court of Appeals entered an opinion and judgment vacating the judgment of the District Court and remanding the causes for a redetermination of the amount of the taxes owing by the respondents and for reexamination of the status of a tax lien in one of the cases. On respondents' motion a rehearing was granted by the Court on November 9, 1959. On March 23, 1960, after the causes were heard and submitted to the Court en banc an opinion and judgment were entered reversing the District Court and remanding the causes with instructions to enter judgment for appellants (respondents here) on the tax claims and to adjudicate the counterclaims (for taxes paid under the tax statute held to be invalid).

The jurisdiction of the Supreme Court to review this judgment is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a tax on the freezer ship line of business carried on in connection with Alaska's commercial fishers is (a) a tax on the taking of fish (as the trial court held), (b) a tax on the entire operation of freezer ships to the extent that such activity occurs within Alaska's taxing jurisdiction (as the Ninth Circuit Court of Appeals first held), or (c) a tax on the "processing of fish by freezing only" (as the Ninth Circuit Court of Appeals held on rehearing)?

2. Whether freezer ships, which lie off the three-mile limit of Alaska (or within Alaskan waters if Bristol Bay is included in State waters), which send their catcher boats within Alaskan waters to catch salmon, which freeze the salmon caught within Alaskan waters and also fish purchased from independent Alaska fishermen, and which transport such fish to Seattle, Washington, are engaged in interstate commerce and are for that reason exempt from the Alaska annual license tax?

3. Whether the fact that an integral part of the operation of a freezer ship in Alaska is the catching of salmon within Alaska waters and preserving the fish so obtained is sufficient to characterize the business of a freezer ship as local in nature and, therefore, not a part of interstate commerce?

STATUTES INVOLVED

The statute involved is Ch. 116, SLA 1951, and in particular, Section 1(b) of that statute. The statute provides:

AN ACT

"Amending Section 1 of Chapter 97, Session Laws of Alaska, 1949 imposing a license tax on

freezer ships and other floating cold storages; and declaring an emergency.

"Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Section 1 of Chapter 97, Session Laws of Alaska, 1949, is hereby amended to read as follows:

"Section 1. BUSINESS IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. *Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:*

"(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

(b) *Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for process-*

ing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

"Approved March 24, 1951." (Italics added.)

In order to present to the Court a picture of the Alaska program for taxing fish processors applicable portions of the following statutes will be referred to and are printed in the Appendix as follows: Sec. 1, Ch. 82, SLA 1949—Exhibit "B"; Sec. 1, Ch. 97, SLA 1949—Exhibit "C"; Ch. 113, SLA 1951—Exhibit "D."

STATEMENT

Approximately ten years ago respondents began to use freezer ships for the taking and preservation of salmon along Alaska shores. These ships are equipped with catcher boats which are used to catch the salmon within three miles of the low tide mark along the Alaska coastline. Freezer ships also occasionally purchase salmon from independent fishermen.

The greatest concentration of the operations of the freezer ships occurs in Bristol Bay. Bristol Bay is a large but very shallow bay, formed to a large extent by the estuaries of the Nushagak, Kvichak and Egegik Rivers. For the Court's convenience, a map of Bristol Bay is attached as Exhibit "E." Bristol Bay is the greatest fishing ground in the world for red (sockeye)

salmon. When operating in Bristol Bay, the freezer ships anchor outside the three-mile limit where they serve as a base for their catcher boats. When operating near Kodiak Island and in Southeastern Alaska they anchor closer to shore and obtain fish from catcher boats while so positioned.

When a catcher boat has made its catch, it returns to the freezer ship and unloads. The fish are immediately frozen in brine and stored. This procedure is followed until the end of the season when the catcher boats are loaded on the freezer ships and the freezer ships return to Puget Sound where the salmon are unloaded and canned (R. 37-42).

The Territory of Alaska has undertaken a policy of taxing all fish processors engaged in business "in connection with Alaska's fisheries." The first example of such legislation was a 1949 act taxing the business of salmon canneries by a tax measured by the value of salmon purchased or otherwise obtained for processing. The measure of the tax was set at 4 per cent of the value of the salmon so obtained. Other businesses "in connection with Alaska's fisheries" were similarly taxed under this act as follows: salmon cold storages freezing fish for the fresh fish market at 1 per cent; herring processing plants at 1 per cent; crab canneries at 1 per cent; clam canneries (not including butter clam canneries) at 2 per cent; and butter clam canneries at 1 per cent. See Ch. 82, SLA 1949, which is attached to this brief as Exhibit "B."

Later in the same session, the Legislature filled some loopholes in Ch. 82 by making those cold storages and fish processors omitted from the coverage of Ch. 82 subject to a tax measured by 1 per cent of the values of fisheries products purchased or otherwise obtained

for processing. See Ch. 97, SLA 1949, which is attached to this brief as Exhibit "C."

In 1951 the Legislature raised the tax on salmon canneries to 6 per cent. See Ch. 113, SLA 1951, attached as an Exhibit "D." In the same year Ch. 97, SLA 1949 was amended by Ch. 116, SLA 1951 to bring freezer ships and floating cold storages doing business "in connection with Alaska's fisheries" within the scope of the Alaska tax program for taxing fish processors. The prosecution of the freezer ship line of business in Alaska was made a taxable incident and the measure of the tax was set at 4 per cent of the value of fisheries products purchased or otherwise obtained for processing through freezing.

In 1955 the Territory brought suit against six freezer ship operators to collect $116,731.53 claimed to be owing under the provisions of Ch. 116, SLA 1951 for taxes, penalties, and interest for the years 1951-1955.

The freezer ship operators attacked Ch. 116, SLA 1951 on several grounds, alleging: (1) repugnance of the statute to the United States Constitution and Federal statutes; (2) inapplicability of the tax because of the territorial limits of Alaska's taxing jurisdiction, to fish on board the freezer ship when the ship is more than three miles from the shore even though the fish have been caught within the three-mile distance; and (3) inapplicability of the tax to the respondents since the tax applies only to fish obtained for freezing: freezer ships, it was argued, obtain their fish for canning.

On March 17, 1956, the trial Court upheld the tax, finding that the taxable event was the taxing of the fish

and also that the tax applied to all fish obtained by the freezer ships. See *Territory of Alaska* v. *The Arctic Maid*, 140 F. Supp. 190 (Alaska 1956) (R. 60, 82).

The freezer ship operators then prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit where the case was argued before a division of that Court. On March 16, 1959, the Court held that the incidence of the tax is the operation of the ships, that the tax can only apply to those operations of freezer ships which occur within Alaska's taxing jurisdiction, and that freezer ships are subject to taxation measured by the value of the fish obtained by their catcher boats since the catcher boats catch their salmon within Alaska waters. The Court ruled that the freezer ships were not required to pay Alaska taxes on fish obtained within Alaskan waters by independent catcher boats and purchased by the freezer ships outside Territorial waters. The Court also ruled that part but not all of Bristol Bay is within the taxing jurisdiction of the then Territory of Alaska. See Appendix "A" of this Brief for a copy of that opinion.

The Ninth Circuit Court of Appeals granted a rehearing on November 8, 1959 and the case was argued before the Court en banc. On March 23, 1960 the Court filed its opinion, holding that the taxable event was the freezing of the fish. Applying the "loading and unloading" test of *Joseph* v. *Carter & Weekes Co.*, 330 U.S. 422, 433 (1947) and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 83 (1946), the Court held that the freezing and cold storage activity of freezer ships takes place after the flow of interstate commerce has begun. The Court further held that the activity of freezing and cold storing fish, engaged in by freezer ships while lying at anchor in Territorial

waters preparatory to transporting such fish to the State of Washington for canning, is an integral part of interstate commerce, and that any territorial privilege tax levied on such activity is forbidden by the Commerce Clause (R. 391).

SUMMARY OF ARGUMENT

The Court of Appeals confused the incidence or subject of the tax and the measure of the tax. The taxable incident is the prosecution of any part of a freezer ship line "of business in connection with Alaska fisheries" that occurs within Alaskan waters. The Court of Appeals stressed certain language used in prescribing the measure of the tax, "processing through freezing," and concluded that this put the emphasis on only one aspect of freezer ship operation in Alaska, that being the freezing of the fish. Petitioner submits that if any emphasis is to be placed on language used in describing the measure of the tax it should be placed on "bought or otherwise obtained," i.e., the taking of the fish.

Under the second opinion of the Court of Appeals freezer ships cannot be taxed by the State of Alaska on the ground that their activities are inseparable from interstate commerce. However, the line of cases followed by the Court are not relevant to operations carried on by freezer ships in Alaska. There is a clear line of cases, discussed in our Argument II of this brief regarding the taxation of businesses which extract resources for later shipment in interstate commerce that is more apposite than cases regarding the transportation of goods and services in interstate commerce.

The exemption of one part of the fishing industry in Alaska from taxation would have a discriminatory

effect on every remaining sector of the industry. Any attempt to avoid this discriminatory effect would require a drastic change in the taxation of Alaska fishing operations. It would require shifting the burden of taxation from the processor to the fisherman. In Alaska this means shifting the burden from those who can afford to pay to those who cannot.

ARGUMENT

I

THE INCIDENCE OF THE TAX IS ON THE CARRYING ON OF ANY PART OF A FREEZER SHIP BUSINESS THAT OCCURS WITHIN ALASKAN WATERS AND IS NOT ON THE "FREEZING OF FISH"

The Alaska Legislature placed the incidence of the tax on the carrying on of any part of the freezer ship line of business occurring within Alaskan waters and did not place it on the "freezing of fish."

The United States Court of Appeals for the Ninth Circuit confused the *incidence* of the tax (the "prosecuting" of the line of business of "freezer ships and other floating cold storages") with the *measure* of the tax (the "value" of the "fishing resource bought or otherwise obtained"). There is no justification for looking further into the tax statute to determine whether or not the measure of the tax narrows or broadens the taxing event. The measure is four per cent of the value of raw fish "bought or otherwise obtained for processing through freezing."

The words "through freezing" are surplusage. A freezer ship is engaged in the business of freezer ship only when and to the extent that it freezes the fish it obtains. Only activities involved in the freezing and storage of fish are taxed under Sec. 1(b) of Ch. 97, SLA 1949, as amended. If the processor in Alaska obtains

and uses the fish for another purpose, it would be engaged in another line of business and would be subject to a different Alaska processor tax. For example, if the ship obtained the fish for canning it would be taxed as a floating cannery at six per cent of the value of the fish obtained for canning.

The Court of Appeals attributed great significance to the words "processing through freezing" and concluded that this put the emphasis of the taxing statute on only one of many phases of a freezer ship operation in Alaska. Under this construction, the incidence of the Alaska business license tax is not on the whole business of the taxpayer occurring within Alaska, but is only upon one narrow aspect of it. This is an exceedingly unusual construction of a business license tax. Petitioner respectfully suggests that if the measure of the tax be referred to in order to define the incidence of the tax, a more proper area for emphasis would be the words "bought or otherwise obtained," that is, the taking of this fish. This was what the trial Court did in locating the taxable incident.

As a general rule, if a tax is laid upon a subject within the taxing power of the state, it will not be condemned because of the measure as such. In *Home Insurance Co.* v. *New York*, 134 U.S. 594, 600 (1890), the Court stated that the "validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount." Therefore, it has been stated that the measure of the tax does not present a constitutional question. See Hartman, *State Taxation of Interstate Commerce* (1953 Ed.) at page 113.

However, this Court has gone behind the statute in some cases and determined when it would treat the

legislatively prescribed measure as the incident or subject of the tax. Thus in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), the Court struck down a tax for the reason "that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume." In that case the Court used the measure as a factor in deciding what is really the subject or incidence of the tax.

Petitioner hopes in this Argument and in the succeeding Arguments to indicate conclusively to the Court the intrastate nature of the tax. Petitioner believes that the Ninth Circuit Court of Appeals was correct the first time it heard the case. In its first decision, since withdrawn, it was held that the taxable event was that portion of a freezer ship's operations which occurs in Alaska's taxing jurisdiction. Catcher boats are an extension of the freezer ship and the catching of fish by catcher boats within Alaska's taxing jurisdiction is sufficient to bring that part of the freezer ship operation under the Alaska freezer-ship tax.

The construction placed upon the freezer-ship tax statute by the Ninth Circuit Court of Appeals is objectionable because it may have the effect of placing the bulk of the otherwise taxable freezer ship activities outside of the geographic limits of Alaska's taxing jurisdiction.[1] If the freezing of the fish is the taxable

[1] If the Ninth Circuit Court of Appeals in its first decision of March 16, 1959 is correct a good part of the freezing activities of the freezer ships takes place outside of the taxing jurisdiction of Alaska. That Court declared most of Bristol Bay to be outside of Alaska's taxing jurisdiction. Under that decision the only part

incident and if the bulk of the fish are frozen outside of Alaska's taxing jurisdiction, only a small amount of taxes could be collected through this tax.

The construction placed on the Alaska tax by the Ninth Circuit Court of Appeals is also objectionable because it suggests that a tax on the freezing of the fish is a tax on an act which is preparatory to the later shipment of the fish to a point outside of Alaska. It suggests that the freezing and the shipment of the fish are somehow inseparably tied together—the theory being that if the shipment of the fish is interstate

---

of much of the freezer ships operations the Alaska tax could reach would be the fishing operations of the freezer ships carried on by their catcher boats. Under that decision the freezing would in many, and perhaps most cases, occur outside of Alaska's taxing jurisdiction.

Alaska strongly maintains, however, that the portion of Bristol Bay east of a line drawn from Cape Newenham to a point 3 miles south of Cape Menshikof is within Alaska's jurisdiction for both taxation and conservation purposes. In support of this the State of Alaska points to a 36-year history of exclusive control over Bristol Bay by the Federal government for conservation purposes under fish and wildlife regulations promulgated under the Act of June 26, 1906, c. 3547, 34 Stat. 478, 48 U.S.C. §§ 230, 231, 235-239, 241, 242 (beginning with Department of Commerce Circular No. 251, 9th Ed. dated Jan. 9, 1923 and ending with 24 FR 3265-3268), the long standing policy of excluding aliens from such waters under the Act of June 14, 1906, c. 3299, 34 Stat. 263, 48 U.S.C. §§ 244-247, and the policy of establishing closed seasons and similar conservation controls in only the waters "over which the United States has jurisdiction" as provided in the Act of June 6, 1924, 43 Stat. 464, c. 272, 48 U.S.C., §§ 225-228, relating to the "protection of fisheries in Alaska and for other purposes." Bristol Bay constitutes waters over which the United States has asserted such jurisdiction and for which closed seasons have been prescribed. Alaska succeeded to most of the Federal government's responsibility for conservation of fish and wildlife resources in Alaska (including Bristol Bay), under Sec. 6(e) of the Act of July 7, 1958, 72 Stat. 339 (the Alaska Statehood Act).

commerce then the freezing must also be interstate commerce. By emphasizing the freezing of the fish alone the connection between the freezing and the later shipment may be emphasized. This may lead to the severance operations of freezer ships being underemphasized or ignored.

If the taking of the fish and their immediate refrigeration after being taken is considered as a whole the emphasis tends to fall on the clearly intrastate operations of the freezer ship.

It should make no difference as far as the constitutionality of the tax is concerned whether the taxable incident is the freezing of the fish or the taking and the freezing taken together.[2] In either event the freezing is more closely tied in with the taking of the fish than with the later transportation of the fish.

II

FREEZER SHIPS, IN TAKING AND PROCESSING FISH BY FREEZING, ARE NOT ENGAGED IN INTERSTATE COMMERCE, BUT ARE INSTEAD ENGAGED IN BUSINESS OF A LOCAL NATURE

Freezer ships, in taking and processing fish by freezing, are not engaged in interstate commerce, but are instead engaged in business of a local nature.

The Ninth Circuit Court of Appeals has held that freezer ships cannot be taxed under Ch. 97 because their activities are inseparable from interstate commerce. Yet the Court used a line of cases in characterizing the

[2] It is important to understand the close relationship between the taking and the freezing. Salmon are highly perishable and cannot be kept in a fresh condition for more than a few days (R. 251). Without the immediate freezing of the salmon, the value of the catch would be nil, unless other methods of local preservation were utilized.

problem which is entirely and classically interstate in nature.

The first main case relied upon by the Ninth Circuit Court of Appeals is a natural gas transmission line case, *Mich.-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). In that case Texas put a tax on the occupation of "gathering gas," measured by the entire volume of gas "taken." A natural gas pipeline company sought recovery of money paid under protest in compliance with the statute. The pipeline company was engaged in an enterprise solely devoted to the transportation of gas and held a certificate of convenience and necessity for that transportation in interstate commerce. The company produced no gas and the gas flowed into its pipes in a finished state with no further refining necessary before interstate transportation began. In fact, the gas was only transported in Texas for 1.74 miles before it was in Oklahoma. The facts resemble very closely those in the case of *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69 (1946), also cited by the Court of Appeals and discussed *infra*, where delivery was made to a ship ready to sail for New Zealand. The facts, however, do not resemble cases involving the extraction of a natural resource or a mineral previous to its refinement or processing preparatory to introduction of the article or product in interstate passage.

In the *Michigan-Wisconsin* case the Court emphasized the "steady and continuous flow" of the oil in the pipeline from producing wells clear through to consumers outside Texas. See 347 U.S. at 163. Another consideration that should be remembered in comparing *Michigan-Wisconsin* to this case is the fact that the Michigan-Wisconsin Pipe Line Co. paid con-

siderable taxes of various sorts to the State of Texas. Respondents pay no other taxes to Alaska.

We wish to emphasize the aspects bearing upon the *Michigan-Wisconsin* decision having relevance to this case. At 347 U.S. 166, Mr. Justice Clark, speaking for a unanimous Court, stated:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. [Cases] And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce." (Brackets added.)

Here the taxing incident is separable from the flow of commerce. It was stated in Argument I of this Brief that there is a significant difference between the taxing *incident* and its *measure*, with significant results for this case. The taxing incident which occurs in Alaska by its very nature is such an incident that it *cannot* occur in any other jurisdiction, regardless of the number of states that the fish pass through.

In the *Michigan-Wisconsin* case the Court was concerned whether Texas had "delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun." See 347 U.S. at 167. The "transmission" in our factual situation is delayed for an entire fishing season, ordinarily for about six weeks.

(R. 45). Catcher boats more or less regularly deliver the catch and it is frozen. This process starts at the opening of the red (sockeye) salmon season and continues to its conclusion. The frozen fish await the end of the season before they are transported to the Puget Sound canneries.

The next case the Court of Appeals relied on in its opinion is the case of *Joseph V. Carter & Weekes Co.*, 330 U.S. 422, 433 (1947). That case involved an essential part of interstate commerce, i.e., the loading and unloading of vessels moving in interstate and foreign commerce. Speaking for the Court, Mr. Justice Reed stated at 427-428:

> "We do not think that a tax on gross income from stevedoring, obviously a 'continuation of the transportation,' is a tax apportioned to income derived from activities within the taxing state. The transportation in commerce, at the least, begins with loading and ends with unloading. *Loading and unloading has effect on transportation outside the taxing state because those activities are* not only preliminary to but are *an essential part* of the safety and convenience *of the transportation itself.*" (Italics added.)

The Court considered the inhibitions to interstate commerce from "unneighborly regulations" to be a significant factor in striking down the excise tax. At page 429 of the Court's opinion, Mr. Justice Reed stated the factor which distinguishes the freezer ship case from the *Joseph* case:

> "The selection of an intrastate incident as the taxable event actually carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy. *This*

result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit.' (Italics added.)

The payment of the Alaska business license tax on the taking and freezing of fish caught in Alaskan waters is quite clearly an event that *cannot* be repeated in any subsequent taxing unit. The fish can only be taxed once as newly caught fish obtained for freezing. The catching of fish is clearly disjoined from commerce, interstate or otherwise. Temporary preservation, in this case by freezing, does not make the process any more a part of interstate commerce than freezing of peas for later shipment to other states makes that activity a part of interstate commerce.

Another case relied upon by the Ninth Circuit is the case of *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69 (1946). Petitioner respectfully suggests that the Court of Appeals used an inappropriate case for reaching its conclusion, since this Court stated quite clearly at page 75 of its opinion that it does "not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article I, Section 10, Clause 2" (The Import-Export Clause).

The facts in the instant case bear little resemblance to the *Richfield Oil* case. There is no basis for use of the Import-Export Clause since all parties involved are American citizens; the destination of the frozen fish is an area in Washington State.

If we attempt to argue by analogy, ignoring the mandate of the Court not to confuse the two clauses, the first facts of that case are still not relevant. The loading of the oil tanker for delivery to New Zealand is

the last step necessary to start the oil in interstate or, as in *Richfield,* foreign commerce. This case is another in the line of authority relating to businesses the major purpose of which is the transportation of goods and services in interstate or foreign commerce. It does not relate to those businesses which are partially or entirely engaged in activities of a purely local nature such as fishing, mining, and the extraction of oil and gas resources.

There is no reason for a freezer ship to operate in Alaska waters if it does not freeze the fish as they are caught. The taking is not feasible if it is not immediately followed by some sort of processing. The processing can be the gutting and curing of the fish, the salting of the fish or the refrigeration of the fish, but some sort of processing must attend the taking of the fish. If any activities of a freezer ship are inseparable the taking of the fish and the immediate preservation of the fish after the taking are. A freezer ship could operate successfully without ever leaving Alaska waters. For example, it could catch and freeze fish for later sale to Japanese freighters or cannery ships in Bristol Bay or to local Alaska canneries. A freezer ship could not, however, lay off of Alaska coasts and take Alaska salmon for approximately six weeks without refrigerating the fish as they are caught. It is important to understand the close relationship between the taking and the freezing. Salmon are highly perishable and cannot be kept in a fresh condition for more than a few days (R. 251). Without the immediate freezing of the salmon, the value of the catch would be nothing, unless other methods of local preservation were utilized. For this reason the later transportation of the fish to Seattle is not deserving of emphasis in determining the nature of a freezer ship

operation. Even if the incidence of the tax is found to be the freezing and the freezing alone, this should not result in the statute being held unconstitutional. The freezing is more properly connected with the taking of the fish than with the later shipment of the fish. This is enough to characterize the freezing as a processing activity of a purely local nature.

Appellant has not discussed the cases cited by the Ninth Circuit Court of Appeals because they are the only cases or are the best cases that can be cited in favor of Respondents' position. These few cases are rather discussed because they are leading cases and are fairly representative of the entire class of authorities which were available to the Ninth Circuit Court of Appeals and to Respondents for purposes of supporting Respondents' theory of the case. We do not believe that any of the hundreds of interstate commerce cases similar to the *Michigan-Wisconsin, Richfield Oil* and *Joseph* cases are any more applicable to the facts presented here than those three cases themselves. They almost all are oil and gas transmission, stevedoring and common carrier cases and they are all inapplicable to severance-preservation operations. By showing that the line of cases cited by the Ninth Circuit Court of Appeals does not apply to the facts here, we expect to bring this case under the only other line of authorities available, that being the line of cases applicable to severance, production, processing, and preservation of resources. We know of no middle ground between these two lines of authority.

The other clear line of authority that the Court discussed but refused to follow is that involving the taxation of businesses which take or extract resources for *later* shipment in interstate commerce. Two of the leading cases from this line of authority are ***Toomer*** v.

Witsell, 334 U.S. 385 (1948) and *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923). The rule in these two cases is that a tax on the extraction of resources does not burden interstate commerce since the taxable event, the severance of the resource, occurs before the resource can be said to have entered the flow of interstate commerce.

The *Oliver Iron Mining Co.* case, *supra*, is particularly in point since this Court sustained a tax upon the mining of ore although substantially all the ore left the state and was put upon cars for that purpose almost immediately after it was produced. It was argued in that case that if the occupation of mining was not actually a part of interstate commerce, it was so closely connected with it that a tax on it would constitute a burden or interference with such commerce. This Court upheld the statute. The analogy between the operation of these mines and the conduct of the freezer ship line of business is so close as to make the *Oliver Iron Mining Co.* the most applicable authority to the facts of this case. The intrastate demand for iron ore was negligible, 262 U.S. 177. N.2; the intrastate market for fish produced by freezer ships is nonexistent (R. 384). "At the openpit mines empty cars are run into the mines and there loaded," 262 U.S. at 178. This compares with the catcher boats going into the shallow waters to catch the fish (R. 383). "When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey." See 262 U.S. at 178. This is a stronger set of facts vis-a-vis the Commerce Clause than the facts in the instant case. Catcher boats load the freezer ship just as the cars are used to load the trains. However, nothing more remained to be done to the iron ore locally, whereas the salmon *must*

be frozen locally or they will spoil. Then again the freezer ships have been spending between 23 and 65 days north of the Dixon Entrance (the southeastern tip of Alaska) (R. 45), whereas the ore trains presumably left Minnesota soon after being loaded. One quotation from the Court's opinion is particularly significant as applied to a freezer-ship operation:

> "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved" 262 U.S. at 179.

The facts in *Oliver* are clearly similar. We submit that the application of the law to the facts should be equally similar.

The other principle case that the Ninth Circuit discussed but refused to follow is *Toomer* v. *Witsell*, 334 U.S. 385 (1948). South Carolina imposed a tax of ⅛ cent a pound on green shrimp taken within the three-mile zone. It was contended that this tax unduly burdened interstate commerce. 334 U.S. at 394. The Court did not agree.

The Court was not faced with a concrete factual situation and refused to construe the statute as applying to any shrimp taken outside the three-mile line. "On its face the statute has no such effect and appellants call our attention to no South Carolina decision so interpreting it." *Supra* at 394. Clearly Alaska has made no claim on the taxation of fish "taken" outside of Alaska's waters. The Court also states that "the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." 334 U.S. at 394-395. See also the cases cited by this Court for the proposition that the taxable event of a tax on the severance of a resource

occurs before the resource enters the flow of interstate commerce: *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284 (1927); *La Coste* v. *Dept. of Conservation*, 263 U.S. 545 (1924); *Oliver Iron Co.* v. *Lord* (discussed *supra*), 262 U.S. 172 (1923); *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Coe* v. *Errol*, 116 U.S. 517 (1886).

III

ANY ATTEMPT BY ALASKA TO CORRECT THE DISCRIMINATORY EFFECT OF THE EXEMPTION OF FREEZER SHIPS OPERATIONS FROM STATE TAXATION WOULD REQUIRE A DRASTIC CHANGE IN THE SOCIAL, ECONOMIC AND POLITICAL APPROACH TO TAXATION IN ALASKA

A review of the various fish processing taxes on fish processors described herein will reveal that it has been the policy of Alaska to insure that the taking of every fish, clam, crab and other fisheries products taken for commercial purposes in Alaska will result in the paying of tax revenues to Alaska and will contribute in meeting the costs of conserving Alaska's fisheries resources. It is also apparent that Alaska has seen fit to place the tax burden on fish processors and not on the fishermen.

The recent decision of the Ninth Circuit Court of Appeals creates a gaping hole in this tax structure. Now all but one class of fish processors processing fish in Alaska are taxed according to the value of the fish taken or obtained. There is now an exception for freezer ships. The taking or obtaining of fish by freezer ships will not now contribute to Alaska's tax revenues nor to the costs of maintaining Alaska's fisheries resources.

This discrimination is so unfair as to demand some correction. A solution is suggested in the next to last paragraph of the opinion of the Ninth Circuit Court of Appeals:

> "Appellants make no contention that the activity of catching fish in Alaskan waters would not be amenable to a non-discriminatory local privilege tax. Toomer v. Witsell, supra, establishes that such an activity may be taxed. . . ."

However, such a solution could only be adopted by abandoning a social, economic and political approach to taxation in Alaska which has been followed for more than 10 years. Presumably a tax could not be constitutionally devised which is levied only upon fish caught by freezer ships. If a severance tax should be placed on fish caught by freezer ships in lieu of a fish processor tax, it would also be necessary to impose severance taxes on all other fish caught in Alaska waters. There are obvious reasons why the Alaska legislature would be reluctant to shift the tax burden from a relatively few solvent fish processors to a large number of fishermen, many of whom are in a poor position to pay substantial severance taxes and many of whom are not accustomed to keeping tax records, or for that matter, records of any kind.

It is apparent that the recent decision of the Ninth Circuit Court of Appeals will have an unusual impact in Alaska. Not only does the State stand to lose more than $116,731.53 involved for the tax years 1950-1955, but it also stands to lose a similar sum for the years 1955-1960. If the discrimination against other fish processors in Alaska is permitted to continue for subsequent years the State will incur additional yearly losses in revenue, while at the same time, operators of freezer ships will continue to have an unfair competitive advantage over fish processors who are taxed. We do not believe that the Commerce Clause was intended to require such discrimination. As a practical matter the State of Alaska under the holding of the Ninth Cir-

cuit Court of Appeals has little choice in determining whether or not this discrimination shall continue since if the State attempts to remedy this discrimination by shifting its fish taxes from the operations of the processors to the taking of fish by the fishermen it will subject a good portion of the Alaska community to taxes which are not only unpopular among the persons which would then be taxed, but which are generally distasteful for social and economic reasons to the Alaska population at large.

CONCLUSION

The Court should distinguish between businesses whose primary purpose is the shipping of articles in interstate commerce and those businesses whose primary purpose is the severance and processing of a resource.

For this reason petitioner respectfully requests that the decision of the Ninth Circuit Court of Appeals be reversed and the cause remanded to the Ninth Circuit Court of Appeals for the determination of other issues including the extent of Alaska's taxing jurisdiction.

Respectfully submitted,

RALPH E. MOODY
Attorney General of Alaska
430 Capitol Building
Juneau, Alaska

GARY THURLOW
Deputy Attorney General
430 Capitol Building
Juneau, Alaska

Counsel for Petitioner,
State of Alaska

Dated this 15th day of
December 1960, at Juneau, Alaska.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,284

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,285

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,286

ALASKA REEFER and ALASKA REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,287

NORTH STAR and NORTH STAR FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,288

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

Mar. 16, 1959

Appeal from the United States District Court for the District of Alaska, First Division

Before: FEE and HAMLEY, Circuit Judges, and SOLOMON, District Judge

SOLOMON, District Judge:

This is an appeal from a judgment requiring appellants to pay to the Territory of Alaska certain taxes imposed as license fees on the freezer ships which they operated in Alaskan waters during the years 1951-1954. These taxes were imposed by Chapter 97, § 1, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951.

Appellants, who are all citizens of the United States, are neither citizens nor residents of Alaska. They operate canneries located on Puget Sound in the State of Washington. In order to obtain fish for their canneries, they send freezer ships equipped with brine-freezing and cold storage facilities to Alaskan waters each year during the salmon fishing season. The fish are caught close to shore with gillnets or seines handled by men in small shallow-draft catcher boats. The appellants operate some of these catcher boats and others are operated by their owners under contract with the appellants. Most of these boats are transported to and from Alaska aboard the freezer ship, which acts

as mother ship for their operations. The freezer ships also obtain fish by purchase from independent fisherman operating their own catcher boats.

The freezer ships stay in deep water, more than three miles from shore in the Bristol Bay area but closer to shore in the Kodiak Island and southeastern Alaska fishing areas. When a catcher boat has its catch, it returns to the freezer ship and unloads. The fish are immediately frozen in brine and stored. At the end of each season the freezer ships return to the canneries on Puget Sound where the fish are thawed and then canned.

The freezer ship tax as provided in Chapter 97, as amended, amounts to 4% of the value of the raw fish bought or otherwise obtained by freezer ships or other floating cold storages for processing through freezing. The trial court found that the tax applied to all fish obtained by appellants. *Territory of Alaska* v. *The Arctic Maid*, Alaska 1956, 140 F. Supp. 190.

Appellants contend that the trial court erred in so holding for the following reasons: (1) the tax is void because it is part of a taxing system which conflicts with the Constitution and with federal statutes; (2) the tax, because of the territorial limits of Alaskan jurisdiction, does not apply to fish taken on board the freezer-ship when it is more than three miles from shore, even though the fish have been caught within the three-mile distance; and (3) appellants obtained their fish for canning, and therefore the tax does not apply to any of their operations as a matter of statutory interpretation because the statute taxes on the basis of fish obtained for freezing.

The case of one appellant, Northern Reefer Company, involves the additional question of the validity of a lien for the taxes asserted by the Territory against the vessel Reefer II. This appellant was an innocent purchaser of the vessel after it had engaged in the operations for which tax is now claimed. The trial court upheld the lien.

I.

Appellants contend that the tax imposed on freezer ships is void because: (1) it is part of a tax system which discriminates against burdens and interstate commerce in violation of the commerce clause, Article I, § 8 of the Constitution; (2) the separate tax classification of freezer ships and other floating cold storages is arbitrary and unreasonable, and is therefore in conflict with the equal protection clause of the 14th Amendment, the privileges and immunities clauses of Article IV, § 2, and the 14th Amendment, the due process clauses of the 5th and 14th Amendments, and the White Act, 43 Stat. 464 (1924), 48 U.S.C. § 22; and (3) the tax is a modification of the United States fish laws and therefore prohibited to the Alaskan legislature by the Organic Act of Alaska, § 3, 37 Stat. 512 (1912), 48 U.S.C. § 24.

The Alaskan statutes provide for these relevant taxes: A tax on salmon canneries, both shore-based and floating, of 6% of the value of the raw fish purchased or otherwise obtained for canning during the year;[1] and 1% of the value of the raw fish diverted for other purposes;[2] a tax

---

[1] Chapter 82, § 1(a), Session Laws of Alaska, 1949, as amended by Chapter 113, § 1, Session Laws of Alaska, 1951, reading as follows:

(a) Salmon canneries, both shore based and floating: An annual license tax equal to 6 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year.

[2] Chapter 82, § 1(a)(1), Session Laws of Alaska, 1949, reading as follows:

(1) Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value.

on freezer ships and other floating cold storages of 4% of the value of the raw fish bought or otherwise obtained for processing through freezing;[3] and a tax on shore-based cold storages and all other fish processors, except salmon canneries and others not here relevant, of 1% of the value of the raw fish bought or otherwise obtained for processing through freezing, salting, or other method.[4] Although the value of the raw fish is not determined in the same way under these three statutes, little testimony was offered on this point, and none of it indicated that the relative amounts of tax were significantly affected by this difference. We shall therefore treat the statutory percentages as reflecting the relative impact of the taxes.

---

[3] Chapter 97, § 1, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951, reading as follows:

(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resources bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished, etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

[4] Chapter 97, § 1(a), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951, reading as follows:

(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished, etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

Appellants claim that the effect of the tax system is to hamper, burden and discourage the interstate movement of salmon prior to final processing. They point to these facts: The shore-based cold storages are taxed at 1% for freezing fish; the Alaskan canneries are taxed 1% for fish which they do not can and are not taxed for freezing fish which they later can; the appellants are taxed 4% for freezing fish. Even assuming that the tax on freezer ships is one affecting interstate commerce and therefore subject to the limitation of the commerce clause,[5] in our view this portion of the Alaskan tax system as applied to appellants does not discriminate against or unduly hamper the interstate movement of salmon prior to final processing. The shore-based cold storages freeze fish for the fresh frozen consumer market; they are not in competition with appellants, who can all their fish. Fish frozen by a cannery but not canned are likewise not in competition with appellants' product. We see no significance in the fact that the Alaskan canneries do not pay a tax at the freezing stage on fish which they later can. This is only an illusory benefit for such fish will be taxed at the 6% rate before they enter the market to compete with appellants' product. The same is true of the fact that the Territory does not collect the 1% freezing tax from shore-based cold storages on fish which are later canned in Alaska, for these fish are likewise subject to the 6% canning tax before they enter the canned salmon market.

Appellants have urged us to consider three cases as principal support for their contention that the freezer ship tax is a burden on commerce: *Foster-Fountain Packing Co.* v. *Haydel*, 1928, 278 U.S. 1; *Toomer* v. *Witsell*, 1948, 334 U.S. 385; and *Memphis Steam Laundry* v. *Stone*, 1952, 342 U.S. 389. None of these cases are in point for in

[5] We do not decide the contested issue of whether the operation of the freezer ships in obtaining and freezing fish in Alaskan waters is in interstate commerce or a purely local operation. Compare *Oliver Iron Co.* v. *Lord*, 1923, 262 U.S. 172.

each case the court found that the statute in question was designed to and actually did operate in a discriminatory manner to discourage use of out-of-state competition and to encourage local industry. No such contention is made here.[6] We conclude that the tax as here applied does not discriminate against or burden interstate commerce so as to violate the commerce clause.

We also reject appellants' next contention that the separate tax classification of freezer ships is arbitrary and unreasonable. Freezer ships are different from the shore-based cold storages in that the former obtain their fish for canning while the latter obtain theirs for the fresh frozen consumer market. The legislature is free to differentiate between different industries, taxing one more heavily than another.[7] Therefore it may tax the canned salmon industry more heavily than the fresh-frozen salmon industry.

It is equally clear that the freezer ships do compete in the same industry as the Alaska canneries. Unlike these competitors, they do not can their fish in Alaska. However, this difference is reflected in the substantially lower tax required of them as contrasted with that paid by the Alaskan canneries. Appellants have contended that certain ships which catch Alaskan salmon and preserve it by icing before carrying it elsewhere for canning, are

---

[6] The statutes declared invalid were:

(a). A Louisiana statute prohibiting export of shrimp from the state before the heads and shells had been removed. *Foster-Fountain Packing Co.* v. *Haydel*, supra;

(b) A South Carolina statute requiring fish caught within the state to be unloaded, packed and stamped before being shipped out of the state. *Toomer* v. *Witsell*, supra;

(c) A Mississippi statute imposing a privilege tax on laundries not licensed in the state which solicited business therein. *Memphis Steam Laundry* v. *Stone*, supra.

[7] *Quong Wing* v. *Kirkendall*, 1912, 223 U.S. 59; *Alaska Fish Co.* v. *Smith*, 1921, 255 U.S. 44; cf. *State Board of Tax Commissioners* v. *Jackson*, 1931, 283 U.S. 527.

not taxed at all. We have been unable to find any substantial evidence in the record that such ships are operating, and therefore reject this contention as not sustained by proof.

It is unnecessary to consider the applicability of the many cases bearing on the question whether arbitrary or unreasonable tax classifications violate the Constitution, since it appears that no arbitrary or unreasonable classification is present in this case. *State Board of Tax Commissioners v. Jackson*, 1931, 283 U.S. 527, 537.

This conclusion of fact likewise answers the argument of appellants that the freezer ship tax violates the White Act, 43 Stat. 464 (1924), 48 U.S.C. § 222, by denying them as United States citizens the right to fish in areas where fishing is permitted by the Secretary of the Interior. Appellants do not contend that this Act grants them immunity from taxation by the Territory in the exercise of their fishing rights. Their argument is that the tax is discriminatory and therefore impairs their right to fish on a basis of substantial equality as guaranteed by the White Act. Since we have found that the freezer ship tax as here applied is not unreasonable, arbitrary or discriminatory, we find that appellants are not prevented from exercising their fishing rights on a basis of substantial equality.[8]

Appellants next contend that the freezer ship tax is an attempt to modify the fish laws of the United States in violation of the Organic Act of Alaska, § 3, 37 Stat. 512 (1912), 48 U.S.C. §24. That Act denies to the territorial legislature authority to alter, amend, modify or repeal, among others, the fish laws of the United States applicable to Alaska, except that "[t]his provision shall not operate to prevent the [Alaskan] legislature from imposing other and additional taxes or licenses." Appellants' contention

[8] This is not a case of a revenue act so harsh that it amounts to a prohibition against fishing. Compare *P. E. Harris & Co.* v. *Mullaney*, Alaska 1949, 87 F. Supp. 248.

is without merit. This is not a case in which fish regulation is attempted through the imposition of a prohibitive license tax on an unwanted activity.[9] The imposition by Alaska of reasonable taxes is clearly permitted by Congress.[10] We therefore find this tax to be valid.

II.

Appellants contend that the freezer ship tax is imposed on the operation of freezer ships and not on the act of taking fish. They conclude that they should be taxed only on those fish taken on board the freezer ships while they were actually within Alaskan waters. The trial court found that the taxable event was the taking of the fish from the waters of Alaska. The court therefore directed that the tax be paid on all fish obtained from Alaskan waters. This included fish obtained by company-operated catcher boats while their mother freezer ship was outside such waters as well as fish purchased by the freezer ship outside Alaskan waters from independent catchers. The court reasoned that a contrary rule would permit evasion of Alaskan tax laws by the subterfuge of anchoring freezer ships outside Alaskan waters while those waters were being fished on behalf of the freezer ships by catcher boats.

We agree with the court below that freezer ships outside Alaskan waters which operate catcher boats within such waters must accept tax responsibility for the fish so obtained. Obtaining fish is an integral part of the operation of the freezer ship. The catcher boats operated by the freezer ship itself are but an extension of that ship's operations. If the extension operates within Alaskan waters, the freezer ship itself is operating within such waters and is subject to Alaska's tax jurisdiction.

---

[9] Compare *P. E. Harris & Co.* v. *Mullaney*, Alaska 1949, 87 F. Supp. 248.

[10] *Pacific American Fisheries* v. *Alaska*, 1925, 269 U.S. 269, 277; *Alaska Fish Co.* v. *Smith*, 1921, 255 U.S. 44.

However, we cannot agree that the freezer ships must pay Alaskan taxes on fish obtained within Alaskan waters by independent catcher boats but purchased by the freezer ships outside those waters. By this device freezer ship operators may reduce their liability for Alaskan taxes. However, Alaska cannot extend its taxes to nonresidents beyond its territorial jurisdiction in order to prevent such tax avoidance. The Territory is free to impose such taxes as it sees fit, within the limits set by the Constitution and federal legislation. By the same token, the freezer ship operators are free to arrange their operations so that the impact of such taxes upon them is minimized. Remaining outside the Territory is one method by which a nonresident may accomplish this purpose.

As to the catcher boats operated under contractual arrangements with appellants, the record does not reveal sufficient information about the nature of such arrangements to enable us to decide whether they should be regarded as extensions of the freezer ships. This question will be remanded for determination by the trial court.

The territorial limits of Alaska are defined by statute as those of the territory ceded by Russia to the United States by the treaty of March 30, 1867, 15 Stat. 539. Organic Act of Alaska, § 1, 37 Stat. 512, 48 U.S.C. § 21. That treaty placed the western boundary of the territory at a line running from the Bering Straights to the most western Aleutian island, thereby taking in most of the Bering Sea, including Bristol Bay. The United States at one time asserted regulatory power over seal fishing throughout this portion of the Bering Sea. An international dispute resulted, which was submitted to arbitration by the United States and Great Britain.[11] The arbitrators held that United States jurisdiction to regulate sealing in the Bering

[11] Arbitration was agreed upon in a convention between the United States and Great Britain, concluded February 29, 1892, 27 Stat. 947.

Sea did not extend beyond the ordinary limit of territorial waters, the three-mile limit.[12]

Since the United States had agreed in advance to abide by the award of the arbitrators,[13] this decision was held to result in a withdrawal to the ordinary three-mile limit of exclusive United States jurisdiction over waters of the Bering Sea. *La Ninfa*, 9 Cir. 1896, 75 F. 513. Because Bristol Bay is an arm of the Bering Sea, forming the southeast corner thereof, the three-mile limit for United States jurisdiction in the Bering Sea applies to much of Bristol Bay as well.

We do not agree with the Territory's contention that the freezer ship operators are liable for taxes on fish obtained outside the three-mile zone in Bristol Bay because Alaskan jurisdiction extends throughout the Bristol Bay fishing area as defined by the United States Fish and Wildlife Service.

Bristol Bay is a portion of the Bering Sea which lies in the angle formed by the Alaskan Peninsula and the mainland to the north. Cape Newenham can be regarded as its northern headland, but its southern boundary the Alaskan Peninsula, extends out into the Pacific Ocean much further than Cape Newenham and provides no clearly defined southern headland. The Fish and Wildlife Service defines the Bristol Bay area as follows:

> "The Bristol Bay area is hereby defined to include all territorial coastal and tributary waters of Alaska from Cape Newenham to a point on the coast 3 statute miles south of Cape Menshikof." 50 Code Fed. Reg. ¶ 104.1.

The distance between Cape Newenham and a point 3 miles south of Cape Menshikof is approximately 172 miles.

---

[12] 27 Am. Law Rev. 703 (1893).

[13] Convention between the Governments of the United States and Her Britannic Majesty, February 29, 1892, 27 Stat. 947, 951.

The shortest distance between Cape Newenham and the Alaskan Peninsula is 165.5 miles and extends to a point 13.5 miles northeast of Cape Seniavin. It has been asserted that Bristol Bay includes the entire area between Cape Newenham and Cape Sarichef, a distance of approximately 290 miles. Bristol Bay is so large and so ill defined by geographical features that it is better described as a corner of the Bering Sea than as a separate body of water.

The Territory contends that Congress and the United States Fish and Wildlife Service have asserted United States jurisdiction beyond the three-mile limit in Bristol Bay. Congress by statute excludes non-United States citizens and non-residents of the "area embracing Bristol Bay and the arms and tributaries thereof" from stake-net and set-net fishing within the area. 43 Stat. 464 (1924) as amended, 48 U.S.C. § 222a. As we have pointed out, the United States Fish and Wildlife Service has a regulation which defines the Bristol Bay fishing area.

The determination of territorial jurisdiction is a political and not a judicial prerogative. Courts are bound to accept assertions of territorial jurisdiction made by Congress or the federal executive, acting within their authority.[14] However, we have carefully considered both the statute and the fishing are designation in the light of the arbitration award in the seal fishing dispute between the United States and Great Britain and the decision of this court in La Ninfa, supra, and are satisfied that neither constitutes an assertion of jurisdiction binding upon us.

What we have said concerning jurisdiction over Bristol Bay beyond the three-mile limit does not apply to Egegik Bay, Kvichak Bay and Nushagak Bay, all of which are regarded as arms and tributaries of Bristol Bay. The

---

[14] *In re Cooper*, 1892, 143 U.S. 472, 503; *Jones* v. *United States*, 1890, 137 U.S. 202; *La Ninfa*, 9 Cir. 1896, 75 F. 513.

width of the entrance of Egegik Bay is less than six miles,[15] and although the width of Kvichak Bay and Nushagak Bay exceed ten miles at their entrances,[16] their locations and history place them within Alaskan jurisdiction.

In *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, [1877] L.R. 2 App. Cas. 394, the Privy Council in discussing whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was part of the territory of Newfoundland and within the jurisdiction of its legislature, stated:

> "It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory. . . ."

In considering the weight to be given historical claims, the court stated:

> ". . . the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclu-

[15] Bays six miles or less at the entrance are automatically included within the territorial limits of a nation by virtue of drawing a three-mile belt from each headland. Eg. *Manchester* v. *Massachusetts*, 1891, 139 U.S. 240, 257.

[16] In case of an indentation up to ten miles wide at the mouth, the lines across the entrance would mark the limits of inland waters and the marginal sea would extend three miles seaward of that line. In the case of an indentation wider than ten miles, the line shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles. Jessup, p. 356; A. L. Shalowitz, Legal-Technical Aspects of the Submerged Lands Cases; (Department of Commerce-U. S. Coast and Geodetic Survey 1954) pages 26-27.

> sive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

The United States and Alaska have exercised jurisdiction over these three smaller bays, and the claims of jurisdiction have not been challenged by any foreign government. In a geographical sense, they belong to Alaska, since they are part and parcel of it. In considering bays with headlands more than ten miles in width, the courts usually attach great importance to the historical claims and assertions of jurisdiction over a particular bay by the littoral sovereign as well as to whether there is a definite geographical relationship between the bay and such sovereign.[17]

The record before us does not specify the areas in which the fishing was done in Bristol Bay during the red salmon season. The statistics concerning the volume and money value of the catch by vessel relates to fishing north of Dixon Entrance (54° 40′ North Latitude). We have already found that much of this area is not within the jurisdiction

[17] *People* v. *Stralla*, 14 Cal. 2d 617, 96 P. 2d 941 (1939); *Cunard Steamship Co.* v. *Mellon*, 1923, 262 U.S. 100. On the role of the courts in treating the problem of jurisdiction over bays, see Jessup, Law of Territorial Waters and Maritime Jurisdiction p. 355 et seq. (1927), and 1 Hyde, International Law §§ 146 et seq. (1945). Professor Hyde, at Page 473, states:

> "The coast of Alaska is indented by certain bays of broad dimensions which by reason of their relation to the land appear to belong in a geographical sense to the sovereign thereof."

Included among such bays are Bristol Bay inside of a line drawn from Igagik (also spelled Egegik) to Protection Point. He states:

> "They are water areas which, regardless of the distance between headlands, it is believed that the United States may formally claim to be its own without violating any requirement of international law."

The line of which he speaks is immediately adjacent to Nushagak Bay and Egegik Bay, and at most is just a few miles from the entrance of Kvichak Bay.

of Alaska. However, there was testimony that the Arctic Maid was anchored between Egegik and the Nakinek River, and particularly between Middle Bluff and Red Bluff, when it received all or most of its fish from catcher boats operating within the three-mile limit during the Bristol Bay red salmon season. The bays within and adjacent to this area are all within the jurisdiction of Alaska.

In view of the unsatisfactory record before us as to the precise location in Bristol Bay and its tributaries in which the freezer ships operated and the absence of information as to the volume and value of the catches during such periods, these facts must also be determined by the trial court upon the remand of this case.

III.

Appellants contend that the statute, by its own terms, does not apply to their operations. The statute taxes on the basis of the value of the raw fish resource "bought or otherwise obtained for processing through freezing."[18] Appellants assert that although they froze all their fish, this was not the purpose for which the fish were obtained. They were all obtained for processing through canning, and the freezing was merely a temporary measure to preserve the fish until they could be brought to the canneries at Puget Sound.

We agree with the court below that the freezer ship tax applies to appellants. It is apparent from both the preamble[19] and the body of the statute that the legislature intended to tax freezer ships. During the years in question and the time the statute was enacted, the only freezer

[18] Chapter 97, § 1(b), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951. The text of the section is set out in footnote 3 supra.

[19] Chapter 116—An Act Amending Section 1 of Chapter 97, Session Laws of Alaska, 1949 imposing a license tax on freezer ships and other floating cold storages, and declaring an emergency.

ships which operated in Alaskan waters were those which obtained their fish for canning. There can be little doubt that the legislature intended to cover operations like those of the appellants when it enacted the freezer ship tax. While the statute is not a model of clarity, we think it clear and broad enough to accomplish this legislative purpose. We therefore reject appellants' narrow construction which would result in frustrating that purpose.

Appellants assert that the Alaska Department of Taxation has itself accepted their interpretation of the phrase "bought or otherwise obtained for processing through freezing." This claim is based on testimony of a Department of Taxation enforcement officer that shore-based cold storages for freezing fish which are later canned in Alaska are not taxed even though a somewhat similar phrase prescribes the tax liability of shore-based cold storages.[20] The Department does collect the six per cent canning tax on such fish. Such testimony, even if it represented the official views of the Department of Taxation, does not support appellants' interpretation that freezing of salmon which are ultimately canned is not taxable under a statute which taxes fish obtained "for processing through freezing." A more plausible explanation is that the Department has construed the Alaskan statutes to require imposition of only the highest applicable Alaskan processing tax on fish processed by more than one taxable method. In any event, we believe that the freezer ship tax is applicable to the appellants.

IV.

The final question concerns the validity of the lien asserted by the Territory against the freezer ship Reefer II, presently owned by appellant Northern Reefer Company. The lien was claimed for taxes due as a result of the operations of the Reefer II by the Grimes Packing Company, its

[20] Chapter 97, § 1(a), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951. The text of the section is set out at footnote 4 supra.

then owner during 1952. Under the statute, an initial fee of $25.00 is required before a ship is operated during any year, with payment of the total fees owing as a result of the year's operation to be made by January 15th of the following year. The Grimes Packing Company paid neither the initial nor final fees. Subsequent to January 31, 1953, the ship was sold to Northern Reefer Company by the estate of O. L. Grimes, sole proprietor of the Grimes Packing Company, for value and without notice of any lien on the vessel. The Alaska Tax Commissioner was unaware of the death of Grimes and the transfer of the vessel. He, therefore, made no claim against Grimes' estate for the taxes now alleged to be due.

The lien against the Reefer II is claimed under the following provision:

> "Liens. All taxes levied or provided or accruing under the provisions of this Act, and the penalties and interest thereon are hereby declared to be a lien prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the business . . ."[21]

The appellant contends that the lien under this statute does not actually attach to the property until the tax is assessed by the Tax Commissioner, and since the tax was not assessed until after appellant's innocent purchase of the vessel, the asserted lien is invalid.

Appellant failed to raise this contention at the trial stage, and appellee urges that we refuse to consider it now. Since this case must be remanded to the District Court to determine other issues, we remand it also for a determina-

[21] Chapter 82, § 4(h), Session Laws of Alaska, 1949, made applicable by Chapter 97, § 4, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951.

tion of the validity of the lien in the light of appellant's new contention.

Conclusion

We hold the freezer ship tax to be valid as to all fish obtained by appellants' freezer ships within three miles of Alaskan shores and within such other Alaskan waters as are within the jurisdiction of the United States. Bristol Bay, or the greater portion thereof beyond the three-mile zone, is not within the jurisdiction of the United States, but Egegik Bay, Kvichak Bay and Nushagak Bay, which are tributaries of Bristol Bay, are all within the jurisdiction of the United States.

The tax on fish obtained within Alaskan jurisdiction by catcher boats operated by appellants is valid, but no tax may be levied upon fish obtained by freezer ships outside Alaskan jurisdiction from independent fishermen even though the independent fishermen caught the fish in waters within Alaskan jurisdiction.

The record before us as to the periods in which the freezer ships operated within Alaskan jurisdiction and the volume and value of the catches during such periods is insufficient to enable us to determine the amount of taxes which are attributable to such operations. The case is therefore remanded to the District Court to make that determination.

This record is also insufficient on the status of the contract catcher boats. The trial court is directed to determine whether the operators of these catcher boats were independent contractors or employees of appellants.

The judgment is vacated and the case remanded for a redetermination of the tax in accordance with this opinion and for a re-determination of the validity of the tax lien asserted against the Reefer II.

(Endorsed:) Opinion. Filed Mar. 16, 1959.

Paul P. O'Brien, Clerk.

APPENDIX B

Section 1, Chapter 82, SLA 1949:

AN ACT

Imposing license taxes upon salmon canneries and other businesses in Alaska's commercial fisheries; providing license requirements, defining violations, prescribing penalties; repealing paragraphs (a) to (g), inclusive, of subsection 7th of Section 35-1-11, Alaska Compiled Laws Annotated, 1949, and subsections 8th and 9th of the same section; and declaring an emergency.

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

"(a) Salmon canneries, both shore based and floating: An annual license tax equal to 4 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year.

"(1) Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value.

"(b) Herring processing plants in the business of canning, curing, salting, freezing or making meal or oil or other processed product including sale of bait herring by either processing plant or bait herring fisherman: An annual license tax equal to 1 percent of the value of the raw herring. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to herring caught in company owned or subsidized boats operated by employees of the processor or under lease or other agreement.

"(c) Crab canneries, both shore based and floating: An annual license tax equal to 2 percent of the value of the raw crabs. The raw crab value for the purpose of this license shall be the actual price paid for same either by cash or its equivalent according to the provisions above set forth for herring processing plants.

"(d) Clam canneries: A license tax equal to 2 percent of the value of the raw clams, with value to be determined according to the provisions above set forth for crab canneries will be levied on razor clams.

"(1) Butter clams shall be taxed in the same manner at the rate of 1 percent of the value of raw clams."

APPENDIX C

Section 1, Chapter 97, SLA 1949:

AN ACT

Imposing license taxes upon certain businesses in Alaska's commercial fisheries; providing license requirements, defining violations, prescribing penalties, and declaring an emergency.

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following licenses [license] taxes which are hereby levied:

"(a) Cold storage and other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement."

APPENDIX D

Chapter 113, SLA 1951:

An Act

"To amend Chapter 82, Session Laws of Alaska 1949, relating to a license tax on salmon canneries; and declaring an emergency.

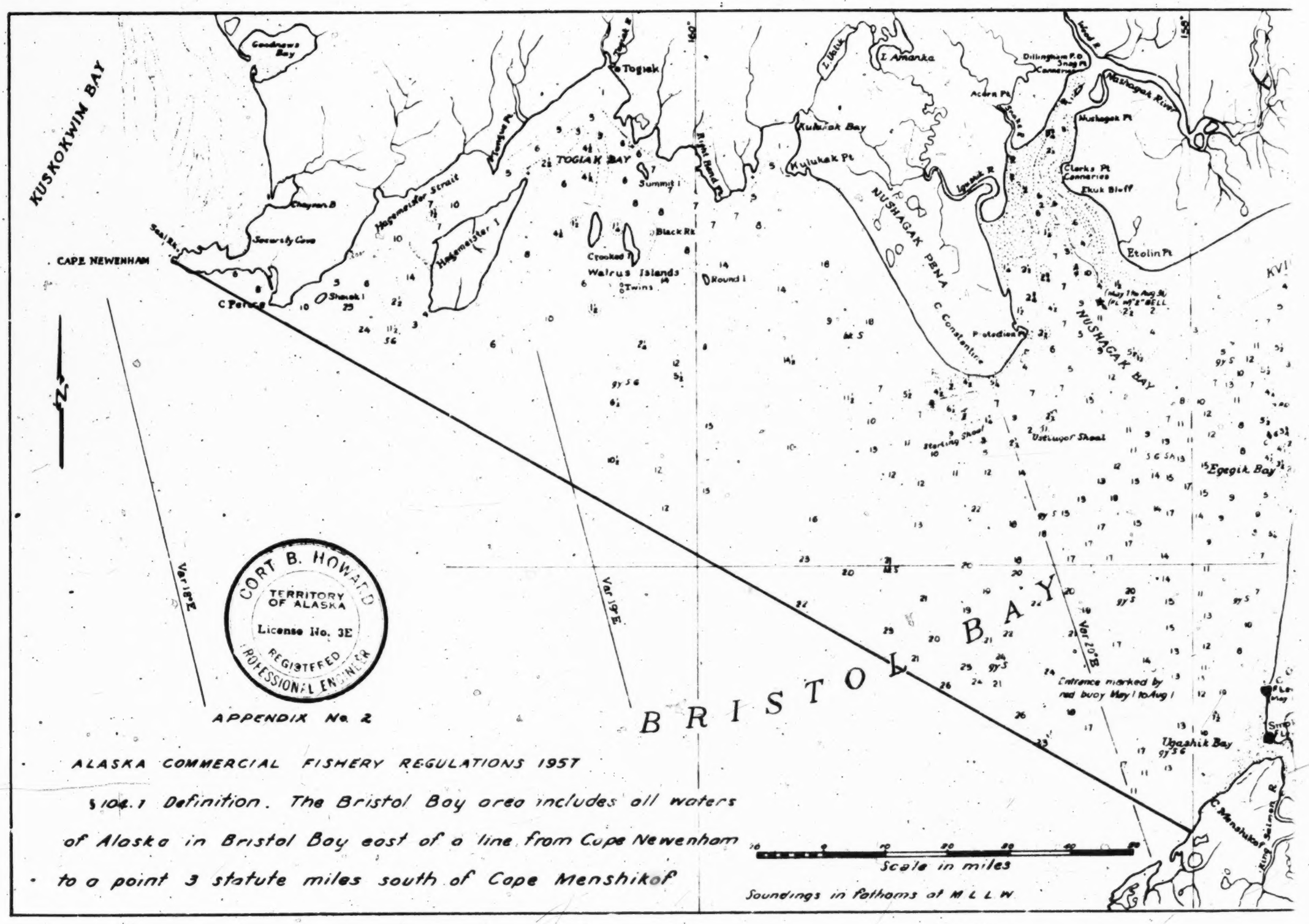
"Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Subsection (a) of Section 1 of Chapter 82, Session Laws of Alaska 1949, is hereby amended to read as follows:

"(a) Salmon canneries, both shore based and floating: An annual license tax equal to 6 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year."

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

"Approved March 24, 1951."

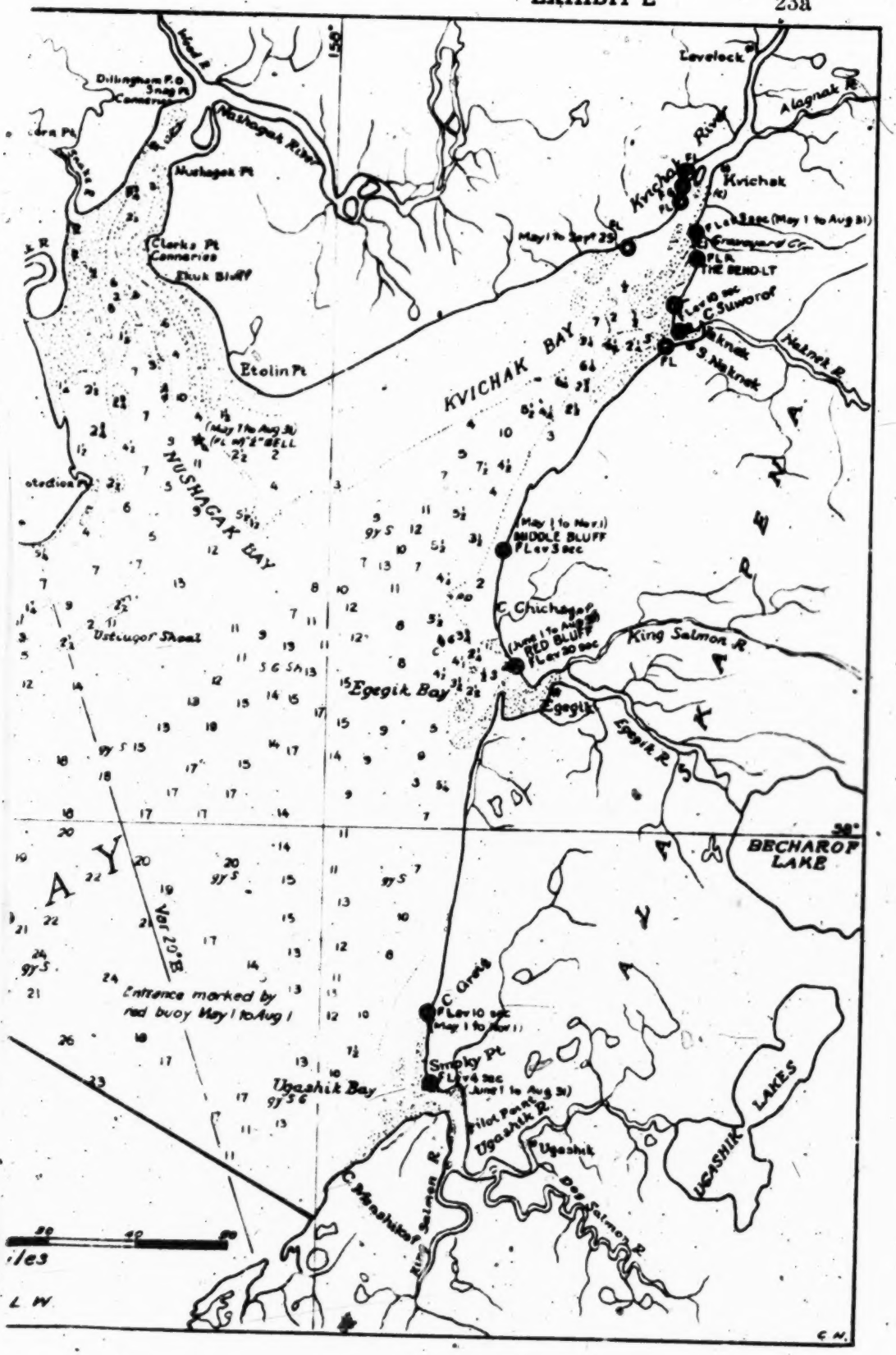


CORT B. HOWARD
TERRITORY OF ALASKA
License No. 3E
REGISTERED
PROFESSIONAL ENGINEER

APPENDIX No. 2

ALASKA COMMERCIAL FISHERY REGULATIONS 1957

§ 104.1 Definition. The Bristol Bay area includes all waters of Alaska in Bristol Bay east of a line from Cape Newenham to a point 3 statute miles south of Cape Menshikof


Dillingham P.O
Snag Pt
Wood R
Nushagak River
Nushagak Pt
Clarks Pt
Cannaries
Ekuk Bluff
Etolin Pt
NUSHAGAK BAY
Ustiugof Shoal
Entrance marked by
red buoy May 1 to Aug 1
Var 20°E
Egegik Bay
Egegik
Egegik R
Kvichak
Kvichak River
Alagnak R
Levelock
Kvichak Bay
Naknek
S Naknek
Naknek R
C Sumnoff
C Chichagof
King Salmon R
BECHAROF LAKE
C Greek
Smoky Pt
Ugashik Bay
Pilot Point
Ugashik R
Ugashik
UGASHIK LAKES
C Menshikof
Big Salmon R
Dog Salmon R
Miles
L W
C N.

FILE COPY

Office Supreme Court, U.S.
FILED
JAN 13 1961
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

STATE OF ALASKA, *Petitioner*,
v.
ARCTIC MAID AND ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC REEFER AND PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC QUEEN AND PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
ALASKA REEFER AND ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
NORTH STAR AND NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY AND REEFER II, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS

EVANS, MCLAREN, LANE, POWELL & BEEKS
MARTIN P. DETELS, JR.
G. KEITH GRIM
Attorneys for Respondents.

1700 Washington Building, Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

STATE OF ALASKA, *Petitioner*,
v.
ARCTIC MAID AND ARCTIC MAID FISHERIES, INC., *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC REEFER AND PACIFIC REEFER FISHERIES, *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC QUEEN AND PACIFIC QUEEN FISHERIES, *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
ALASKA REEFER AND ALASKA REEFER FISHERIES, *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
NORTH STAR AND NORTH STAR FISHERIES, *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY AND REEFER II, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS

EVANS, MCLAREN, LANE, POWELL & BEEKS
MARTIN P. DETELS, JR.
G. KEITH GRIM
Attorneys for Respondents.
1700 Washington Building, Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Constitutional Provisions and Statutes Involved	2
Questions Presented	5
Statement of the Case	6
Summary of Argument	14
Argument	15
I Summary	15
The Incidence of the Tax	15
Respondents' Activity Is An Integral Part of Interstate Commerce	20
The "Severance" Tax Cases Are Inapplicable	24
II Summary	25
Respondents Are Engaged In Interstate Commerce	25
The Act Discriminates Against Interstate Commerce	27
III Other Constitutional Issues	33
The Due Process Clause	34
The Classification Defense	34
Suggested Treatment	35
Conclusion	36
Appendix A—Chapter 97, SLA 1949	37
Appendix B—Sections 1 and 2, Chapter 66, SLA 1949	40

CITATIONS

Cases:

Anderson v. Mullaney, 191 F.2d 123 (9th Cir. 1951)	16, 19, 26, 27, 35
The Arctic Maid, et al. v. Territory of Alaska, 277 F.2d 120	15, 16, 18, 19, 20, 24, 25, 33
Best & Co. v. Maxwell, 311 U.S. 454 (1940)	33
Boynton v. Virginia, ... U.S. ....., 5 L.Ed.2d (Adv.) 206 (Dec. 5, 1960)	23
Cooney v. Mountain States T. & T. Co., 294 U.S. 384 (1935)	32

Page

Crenshaw Bros. v. Southern Pacific Co., 40 Cal. App. 603, 181 Pac. 252 23
Cunard Steamship Co. v. Mellon, 262 U.S. 100 (1923) 34
East Ohio Gas Co. v. Tax Commission, 283 U.S. 465 (1931) 32
Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) 28, 29, 30
Freeman v. Hewit, 329 U.S. 249 (1946) 30, 32
Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939) 22
P. E. Harris & Co. v. Mullaney, 87 F.Supp. 248 (D. C. Alaska, 1949) 35
Joseph v. Carter & Weekes S. Co., 330 U.S. 422 (1947) 15, 20, 22, 23
McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940) 15, 32
Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948) 26
Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952) 16, 30, 31
Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580 (1935) 35
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 15, 20, 21, 22, 23, 24, 36
Mullaney v. Anderson, 342 U.S. 415 (1952) 13, 16, 19, 26, 35
Nippert v. Richmond, 327 U.S. 416 (1946) 20
Northwestern States Portland Cement Co. v. Minnesota, 385 U.S. 450 (1959) 15
Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) 24
Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90 (1937) 20
Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954) 16
Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 35
Safe Deposit & Trust Company v. Virginia, 280 U.S. 83 (1929) 34

Page

Spector Motor Service v. O'Connor, 340 U.S. 602 (1952) 15
Sprout v. South Bend, 277 U.S. 163 (1928) 32
Toomer v. Witsell, 334 U.S. 385 (1948) 24, 28, 29, 30
Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940) .. 16

United States Constitution:

Article I, § 8, cl. 3 ..... 3, 5, 14, 15
Article IV, § 2 ..... 5, 33
Amendment V 4, 16
Amendment XIV, § 1 ..... 4, 5, 16, 33

Statutes:

Act of June 26, 1906, c. 3547, §§ 7, 8, 34 Stat. 480, as amended 48 U.S.C. §§ 235, 236 11
Act of August 24, 1912, c. 387, § 3, 37 Stat. 512, 48 U.S.C., § 23 (The Organic Act) 3, 4, 16
Act of June 6, 1924, c. 272, § 1, 43 Stat. 464, 465 (The White Act) 4
Act of July 7, 1958, 72 Stat. 339, § 30, 48 U.S.C.A. (1960 Supp.) (The Alaska Statehood Act) 3, 4
Act of June 25, 1959, 73 Stat. 141, § 3, 48 U.S.C.A. (1960 Supp.) (Alaska Omnibus Act) 5
Chapter 66, Session Laws of Alaska 1949 ..... 2, 12, 18, 26, 27, 41
Chapter 82, Session Laws of Alaska 1949 .. 2, 3, 12, 13, 31
Chapter 97, Session Laws of Alaska 1949 ..... 2, 3, 4, 13, 17, 18, 19, 33, 37
Chapter 113, Session Laws of Alaska 1951 ..... 2, 3, 12, 13, 34
Chapter 116, Session Laws of Alaska 1951 ..... 2, 3, 12, 13, 15, 17, 35
Chapter 67, Session Laws of Alaska 1953 ..... 2, 12
Chapter 102, Session Laws of Alaska 1955 3
Chapter 97, Session Laws of Alaska 1959 3

Page

Chapter 190, Session Laws of Alaska 1959 ..... 3, 18
Chapter 131, Session Laws of Alaska 1960 3

Miscellaneous:

"Freedom of the Seas; The Present State of International Law," by Oscar R. Houston, 42 A.B.A.J. 235 (1956) 34

In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

STATE OF ALASKA, *Petitioner*,
v.
ARCTIC MAID AND ARCTIC MAID FISHERIES, INC., *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC REEFER AND PACIFIC REEFER FISHERIES, *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC QUEEN AND PACIFIC QUEEN FISHERIES, *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
ALASKA REEFER AND ALASKA REEFER FISHERIES, *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
NORTH STAR AND NORTH STAR FISHERIES, *Respondent.*

STATE OF ALASKA, *Petitioner*,
v.
NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY AND REEFER II, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The license tax statute held unconstitutional by the Court of Appeals was enacted by the Legislature of the Territory of Alaska, as Chapter 97, SLA (Session Laws of Alaska) 1949. Section 1 was amended by Chapter 116, SLA 1951, to increase the rate of tax upon freezer ships from 1% to 4%; and this litigation involves only tax years subsequent to that amendment. Chapter 116, SLA 1951 is correctly set forth at pp. 3-5 of Petitioner's Brief. Chapter 97, SLA 1949, as originally enacted, is set out in its entirety in Appendix A to this brief.

An understanding of Alaska's fisheries taxation program requires study of Chapter 82, SLA 1949, as amended by Chapter 113, SLA 1951, which imposed a license tax on salmon canneries and other processors, and Chapter 66, SLA 1949, which imposed a license tax on resident and non-resident fishermen.[1] The pertinent provisions of Chapter 82, SLA 1949 and Chapter 113, SLA 1951, are set forth as Appendices B and D, respectively, to Petitioner's Brief. Sections 1 and 2 of Chapter 66, SLA 1949 are set forth as Appendix B to this brief.

Each of these tax statutes has been amended or otherwise affected by enactments subsequent to the period involved in this cause. For convenience, the later history is footnoted.[2]

[1] Sec. 2 of Ch. 66, SLA 1949, was amended by Ch. 67, SLA 1953, to reduce the amount of tax levied upon non-resident fishermen from $50.00 to $10.00.

[2] Ch. 66, SLA 1949, as amended by Ch. 67, SLA 1953: § 2 further amend-

The Court of Appeals held Chapter 97, SLA 1949, as amended, repugnant to the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3, which provides as follows:

> "The Congress shall have Power . . .;
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

This and other provisions of the Constitution, if not applicable to the former Territory of Alaska *ex proprio vigore*, were made applicable by The Organic Act of Alaska, Act of August 24, 1912, c. 387, § 3, 37 Stat. 512, 48 U.S.C. § 23,[3], which provided in pertinent part as follows:

> "That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; . . ."

It is also relevant that The Organic Act placed restrictions upon the power of the Territorial Legislature over Alaska's fisheries:

> "Provided, That the authority herein granted to the legislature to alter, amend, modify, and re-

---

ed by Ch. 98, SLA 1955; repealed by Ch. 97, Art. IV, § 1, SLA 1959, but see Art. III, § 6 of the same Act, imposing a similar tax, further amended by § 19, Ch. 131, SLA 1960.

Ch. 82, SLA 1949, as amended by Ch. 113, SLA 1951: See Ch. 190, SLA 1959.

Ch. 97, SLA 1949, as amended by Ch. 116, SLA 1951: § 1 amended by Ch. 102, SLA 1955. See also Ch. 190, SLA 1959.

[3] Presumably repealed by The Alaska Statehood Act, Act of July 7, 1958, 72 Stat. 339, § 30, 48 U.S.C.A. (1960 Supp.) p. 14.

peal laws in force in Alaska shall not extend to the . . . fish . . . laws of the United States applicable to Alaska, . . .: Provided, further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." Act of August 24, 1912, c. 387, § 3, 37 Stat. 512, 513, 48 U.S.C. § 24.

Twelve years later, Congress enacted the White Act, which conferred regulatory power over Alaska's fisheries upon the Secretary of Commerce (later the Secretary of the Interior), but provided that every regulation should be of general application within the area to which it applied, and that:

". . . nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior." Act of June 6, 1924, c. 272, § 1, 43 Stat. 464, 465, as amended, 48 U.S.C. § 222.[4]

Respondents also challenged the constitutionality of Chapter 97, SLA 1949, as amended, in the courts below, as an attempt to tax activities outside the territorial jurisdiction of Alaska, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the Federal Constitution, which provide in pertinent part as follows:

"No person shall . .. be deprived of life, liberty or property, without due process of law; . . ."

Amendment V.

[4] The functions of the Secretary of the Interior under the provisions of this Act were terminated and transferred to the State of Alaska by Executive Order No. 10857 of January 4, 1960, 25 F.R.3; 48 U.S.C.A.

"nor shall any State deprive any person of life, liberty or property without due process of law; ..."

Amendment XIV, § 1.

Respondents also contend the classification effected by Alaska's fisheries tax program violates the Equal Protection Clause of the Fourteenth Amendment (if, as respondents believe, the tax classification is not based upon residence) or (if so based) the Privileges and Immunities Clause of Art. IV, § 2, and the Fourteenth Amendment. The material provisions are as follows:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Art. IV, § 2.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; .. .. nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment XIV, § 1.

QUESTIONS PRESENTED

1. May Alaska impose a license tax, consistently with the Commerce Clause of the U.S. Constitution, Art. I, § 8, cl. 3, upon the privilege of engaging in the activity of freezing or storing a product after it has been loaded aboard a vessel on which it is to be trans-

(1960 Supp.) p. 34. The substantive right set forth above has not been repealed, unless the Alaska Omnibus Act, Act of June 25, 1959, § 3, 73 Stat. 141, effective June 30, 1961, has such effect.

ported in interstate commerce for later processing in another state?

2. May Alaska impose a license tax, consistently with the Commerce Clause, upon persons for the privilege of engaging in an activity essential to interstate shipment and later processing in another state while no tax is imposed upon persons for the privilege of engaging in the identical activity if the later processing is performed in Alaska?

STATEMENT OF THE CASE

Respondents submit that petitioner's three-paragraph treatment of the facts of the case is inadequate to present the issues to this Court.

Respondents, Pacific Reefer, Pacific Queen, Alaska Reefer, and North Star,[5] were at all material times partnerships and the owners and operators of vessels specially converted and equipped for operation as freezer ships. R. 37. All of the partners in these respondent partnerships were residents of the States of Washington or California and citizens of the United States, R. 42, and the port of registry of each vessel is Tacoma, Washington. App. 1 to Ex. 1,[6] R. 43.

Arctic Maid Fisheries, Inc. is a Washington corporation and was and is the owner and operator of the D/V ARCTIC MAID, a vessel similarly converted and

[5] For brevity and convenience, respondents are designated by the names of their respective vessels which, in each case, is a part of the partnership or corporate name.

[6] All exhibits referred to herein were incorporated in the record as part of Pl. Stip. No. 1, R. 32, or Def. Stip. No. 1, R. 55, which were admitted at R. 224.

equipped. The port of registry of the freezer ship ARCTIC MAID is Seattle, Washington. R. 37, 42; App. 1 to Ex. 1, R. 43.

Respondents are engaged in the business of operating freezer ships. Their activities may be summarized as follows: the acquisition of salmon (either by operation of owned gillnet "catcher" vessels manned by their employees or purchase from independent fishermen or fishermen who contract to deliver to respondents salmon caught by their own "catcher" vessels), loading, freezing, storage, transportation, canning and marketing of the salmon so obtained. R. 37-42.

Prior to the commencement of the salmon season and after preparation of the vessel for operations, respondents' vessels depart from their respective Puget Sound, Washington, home ports for Bristol Bay and other fishing areas off the coast of Alaska. The freezer ships are not equipped to and do not engage in any fishing. They serve as "mother" vessels for small fleets of gillnet "catcher" boats. Most of these "catcher" boats, 30 to 32 feet in length, are transported from Puget Sound to the fishing areas at the beginning of the season on the decks of their respective "mother" vessels and are returned to Puget Sound at the end of the season in the same manner. Ex. 1, R. 37-42.

Each "catcher" boat owned and operated by respondents was manned by two fishermen employed under the terms of a labor agreement between the salmon industry and the Alaska Fishermen's Union, as modified by a special addendum applicable to freezer ship operations. In outline, the respondents furnished

the "catcher" boat, its fuel and all gear, provided food and quarters aboard the "mother" vessel, paid a fixed sum as "run money" for the period in which the fishermen were aboard the freezer ship en route to or from the fishing area, provided air transportation in one direction from Seattle to the fishing areas, if desired, and paid the current seasonal price for all salmon caught and landed aboard the "mother" vessel by the fishermen. R. 38.

During the Bristol Bay red salmon season, respondents' vessels anchored seaward of a line drawn parallel to and at a distance of three miles from mean low tide mark on the shore of Bristol Bay and served as a base for the operations of their "catcher" boats. The Court of Appeals assumed for the purpose of considering the Commerce Clause that while so anchored, respondents' vessels were in territorial waters. It did not find it necessary to decide that question. 277 F.2d 120, 125, R. 388. The position of the vessels seaward of this line is dictated by the necessity for leaving an unimpeded area close to shore for the operation of the "catcher" boats and not by any consideration of tax consequences. R. 38-39.

At the beginning of each "open" fishing period authorized by the United States Fish & Wildlife Service, the "catcher" boats leave the "mother" freezer ships and proceed to the fishing grounds closer to shore to fish. After fishing is completed, the "catcher" vessel returns to the "mother" ship where the fish are tallied and transferred to the "mother" vessel by means of a net which is lowered from the "mother" ship to

the deck of the "catcher" boat. The net is then hoisted aboard the freezer ship and the salmon are dumped into permanently installed quick-freezing brine tanks, in which the salmon are frozen in a circulating brine solution, the temperature of which has been reduced by refrigeration to a point below the temperature at which the salmon become fully frozen, but at which the solution remains fluid because of its salinity.[7] Normally, the frozen salmon are then transferred by chutes, leading from traps in the bottom of the brine, to dry frozen storage compartments for storage and transportation, although in some instances the tanks themselves are used for that purpose. R. 39-41.

Some of the respondents have also obtained some salmon by purchase from fishermen who operate their own "catcher" vessels. Some of these fishermen are wholly independent, while others have entered into contracts with respondents for the delivery of all their catch to respondents' vessels.[8] R.37.

The respondents' operations during other fishing seasons and in other fishing areas differ from the above description only in that the freezer ship anchors closer to shore and receives fish within the three-mile limit. R. 40.[9]

---

[7] In the 1951 season only, Pacific Queen employed the "air-blast" method of freezing.

[8] The number of fish obtained by these other methods is not contained in this record.

[9] In its first opinion, later withdrawn by the Court *en banc*, a panel of the Court of Appeals apparently held that part of Bristol Bay east of a line drawn from Protection Point (the western entrance of Nushagak Bay) to Egigik (on the north shore of Alaska Peninsula), within the territorial waters of Alaska (See App. E to Pet. Br.). The record does

At the conclusion of their operations, respondents' vessels return to Puget Sound, Washington, and discharge their fish. All salmon frozen by the respondents during the years in suit were canned by respondents in the State of Washington prior to further resale. R. 41-42.[10] Each respondent paid Washington Business and Occupation Tax with respect to the canning of their salmon in the State of Washington. Ex. 8, R. 47.

A concise description of the function of freezer ships was given by Petitioner's witness, Thomas Parke, Special Deputy and Enforcement Officer for the Department of Taxation, who testified:

> "The freezer ship is an operation of securing the fish in the bulk and using the hold of the ship in the storage capacity as a raw product to hold them until they can get them to the cannery, or to the plant for processing." R. 301.

It was stipulated in the course of trial, at the request of Petitioner, that respondents ". . . process, your entire operation was canning, is that all right?" Respondents so stipulated. R. 345-346.

The salmon obtained by respondents are not cleaned, gutted, dressed, beheaded, or otherwise processed aboard respondents' vessels. They are frozen "in the round." R. 243, 244. Freezing adds no economic value to the salmon. It is a step which is essential, because of

---

not show the number or value of salmon obtained or frozen by respondents while their vessels were west of the line so drawn. There is no support in the record for Petitioner's assertion (Br. 12-13) that most of respondents' freezing activity occurs outside its taxing jurisdiction, if so defined.

[10] With the exception of 500 lbs. sold in a frozen condition by Alaska Reefer in 1952. R. 42.

the perishable character of the salmon, to their preservation for later canning. Alaskan shore canneries avoid freezing "if they possible can," because of the added expense of freezing and later canning. R. 252. Congress requires that salmon be frozen, or preserved in some other manner, "within forty-eight hours after being killed," and makes it unlawful to waste or destroy salmon taken in Alaskan waters. Act of June 26, 1906, Ch. 3547, §§ 7, 8, 34 Stat. 480, as amended, 48 U.S.C. §§ 235, 236. Interstate transportation of salmon is impossible, as well as unlawful, without preservation by freezing or some other method.

Shore canneries and cold storage plants also freeze salmon to preserve them for later canning in Alaska. This occurs during "heavy runs" when the canning capacity of the plant is inadequate for the volume of fish obtained, and also when salmon suitable for canning are received early in the season prior to the opening of the canneries. "Ordinarily that is done throughout Alaska, just merely a storage place for them for the time being." Parke, R. 251-252. "It is a regular occurrence each year. . . ." Pinkerton, R. 245. See also George, R. 247-248.

The comparative impact on Alaska's economy and resources, of canneries and freezer ships is shown in the record by Ex. 17, R. 57. For the six-year period, 1949-1954, inclusive, the total pack of shore canneries exceeded 20 million cases of forty-eight one-pound cans, as compared with the freezer ship production of approximately 380 thousand cases, or less than 2%. Their relative significance to Alaska's revenue is shown by

Exs. 14 and 11, R. 52 and 49, respectively, which show that in the same six-year period Alaska received over $10,100,000 in processing taxes from land-based canneries, as compared with approximately $128,000 in taxes collected and claimed from freezer ships for the same period.

During the years involved in this case, 1951-1954, inclusive, Alaska's salmon fisheries taxation program was embodied in three statutory enactments:

1. Chapter 66, SLA 1949, as amended by Ch. 67, SLA 1953, which required a license for "any person who fishes commercially for, takes or attempts to take salmon, . . .", and imposed a tax of $5.00 on resident fishermen, and $50.00, reduced to $10.00 in 1953, (following the judgment in *Mullaney v. Anderson*, 342 U.S. 415 (1952)), on non-resident fishermen. App. B.

2. Chapter 82, SLA 1949, as amended by Ch. 113, SLA 1951, which required a license for persons prosecuting or attempting to prosecute the line of business of salmon canneries, both shore based and floating, and imposed a tax of 6% of the value of raw fish obtained for canning (increased from 4% in 1951), and a tax of 1% of the value of salmon received and diverted for other purposes. Apps. B and D to Pet. Br.

3. Chapter 97, SLA 1949, as amended by Ch. 116, SLA 1951, which required a license for persons prosecuting or attempting to prosecute the line of business of shore based cold storages, and freezer ships and other floating cold storages, and imposed a tax of 1% of the value of raw fish obtained for processing by

shore based cold storages, and a tax of 4% of such value, on fish obtained for processing by freezer ships and other floating cold storages. App. B; App. C to Pet. Br.

A flat license fee is thus imposed on persons "taking," *i.e.*, catching, salmon. In addition, a license is required, and a tax is imposed upon persons engaged in the processing of salmon, which tax is measured by the value of the raw fish and computed at the rates specified in Chapters 113 and 116, SLA 1951.

Alaska's fisheries tax program with respect to persons who engage in the freezing of salmon has the following impact on the categories of processors affected:

(1) Freezer ships. Taxed at the rate of 4% of the value of raw salmon which they freeze to preserve for later processing by canning in another state. § 1 (b), Ch. 97, SLA 1949, as amended by Ch. 116, SLA 1951.

(2) Salmon canneries and shore based cold storages:

(a) Not taxed with respect to the value of raw salmon which they freeze to preserve for later processing by canning in Alaska.[11] R. 246, 252-253.

(b) Taxed at the rate of 1% of the value of raw salmon which they freeze, but do not later process by canning in Alaska. (Salmon canneries—§ 1 (a) (1) Ch. 82, SLA 1949, as amended by Ch. 113, SLA 1951; Shore cold storages — § 1 (a), Ch. 97, SLA 1949, as amended by Ch. 116, SLA 1951.

[11] Salmon canneries are taxed with respect to the later canning of such salmon. The significance of this tax is discussed in this brief at pp. 31-32, infra.

SUMMARY OF ARGUMENT

I.

The tax is imposed upon the privilege of engaging in interstate commerce in raw salmon. The "incidence" of tax is the freezing and storage of salmon after they have been loaded aboard respondents' vessels for shipment and have entered the flow of interstate commerce. A local privilege tax so laid is forbidden by the Commerce Clause, U.S. Const., Art. I, § 8, Cl. 3.

II.

Alaska taxes freezer ships for the privilege of engaging in activity essential to interstate shipment and later processing of salmon in another state, but imposes no tax upon persons performing the identical activity, if later processing is performed in Alaska. In its practical operation, therefore, the tax works forbidden discrimination against interstate commerce.

III.

Respondents challenge the tax under the Due Process, Equal Protection and Privileges and Immunities clauses of the Constitution. Grave questions are presented under those provisions, if the tax is held not repugnant to the Commerce Clause. If those issues are reached, the cause should be remanded to the Court of Appeals, which has not passed upon the questions thereby presented.

ARGUMENT

I.

Summary

The Tax Is Imposed Upon the Privilege of Engaging in Interstate Commerce in Raw Salmon. The "Incidence" of Tax Is the Freezing and Storage of Salmon After They Have Been Loaded Aboard Respondents' Vessels for Shipment and Have Entered the Flow of Interstate Commerce. A Local Privilege Tax So Laid Is Forbidden by the Commerce Clause, U.S. Const., Art. I, § 8, Cl. 3.

The Incidence of the Tax

The Court of Appeals properly held that Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951 (hereinafter sometimes called the "Act"), was unconstitutional, as applied to respondents, as imposing a tax upon the privilege of engaging in interstate commerce, and was therefore forbidden by the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. *The Arctic Maid, et al. v. Territory of Alaska,* 277 F.2d 120; R. 381.

A state may not tax the privilege of engaging in interstate commerce.[12] This is so, whether or not the tax discriminates against such commerce.[13] It is immaterial that the taxpayer has benefited from local expenditures for conservation.[14] Alaska, when a Territory, was

---

[12] *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959); *Spector Motor Service v. O'Connor,* 340 U.S. 602, 608-610 (1951); *Joseph v. Carter & Weekes S. Co.,* 330 U.S. 422 (1947); *McGoldrick v. Berwind-White Co.,* 309 U.S. 33, 48 (1940).

[13] *Spector Motor Service v. O'Connor,* 340 U.S. 602, 607 (1951); *Joseph v. Carter & Weekes S. Co.,* 330 U.S. 422, 433 (1947).

[14] *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 163-164.

subject to the same constitutional limitation,[15] as both lower courts have recognized. Petitioner does not contend that it was not.

The threshold question to be resolved in determining whether a state tax is forbidden by the Commerce Clause is that of the "operating incidence" of the tax.[16]

This Court has said, in considering the validity of a state tax attacked on grounds of repugnance to the Commerce Clause:

> ". . . neither the state courts nor the legislatures, by giving the tax a particular name or by use of some form of words, can take away our duty to consider its nature and effect, . . . in which inquiry we are concerned only with its practical operation . . ." *Railway Express Agency, Inc. v. Virginia,* 347 U.S. 359, 363 (1954).

The Court of Appeals held that ". . . it is the freezer ship activity of processing through freezing which is taxed." 277 F.2d 120, 126; R. 388.[17] While petitioner's

---

[15] Act of August 24, 1912, c. 387, § 3, 37 STAT. 512, 48 U.S.C. 923; *Anderson v. Mullaney,* 191 F.2d 123 (9th Cir. 1951); affirmed sub nom; *Mullaney v. Anderson,* 342 U.S. 415 (1952).

[16] "For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax." *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444 (1940);

"In passing upon the validity of a state tax challenged under the Commerce Clause, we first look to the 'operating incidence' of the tax." *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389, 391 (1952).

[17] The Court below pointed out that if the tax were intended to include such extraterritorial activity as the movement of freezer ships to and from the fishing grounds, the tax would be invalid under the Due Process Clause of the Fifth and Fourteenth Amendments. 277 F.2d 120, 125; R. 387.

position as to the incidence of the tax is not clear to respondents, the contention that it is the taking of fish cannot be supported under any reasonable construction of the Act read alone or in conjunction with the other relevant Alaskan statutes and is, moreover, inconsistent with the administrative construction placed on the Act and its sister statute by petitioner itself.[18]

Section 1 (b) of Chapter 97, SLA 1949, as amended by Chapter 116, SLA 1951, imposes the requirement of a license for, and levies a tax on, the prosecution of the line of business of freezer ships and floating cold storages. The measure of the tax is the value of the fish "bought or otherwise obtained for processing through freezing." The statute recognizes and the record shows that freezer ships load, freeze, store, transport, can and market salmon which they do not catch, but purchase from independent fishermen. If the taxable incident were the taking of fish, respondents would not be subject to tax with respect to salmon which they did not take, yet petitioner contends here, and has always contended, that respondents are taxable with respect to all fish frozen by them, without regard to where, or by whom, they were caught.

In fact, Alaska levies and collects taxes, under Section 1 (a) of the Act, from shore based cold storages, while the record shows without dispute that shore

[18] On page 10 of its brief petitioner states: "A freezer ship is engaged in the business of freezer ship only when and to the extent that it freezes the fish it obtains. Only activities involved in the freezing and storage of fish are taxed under Sec. 1(b) of Ch. 97, SLA 1949, as amended." However, on page 11 and following of its brief petitioner seems to argue that "the taxable incident" is the taking of the fish.

based cold storage plants purchase all their fish from independent fishermen, do not operate their own vessels and thus "take" no fish. George, R. 335-336; Parke, R. 305-306.[19]

Petitioner in fact later argues that ". . . Alaska has seen fit to place the tax burden on fish processors and not on the fishermen," (Br. 23); that it would be politically unpalatable for the Alaska legislature to shift ". . . its fish taxes from the operations of the processors to the taking of fish by the fishermen . . ." (Br. 24-25). How can it be heard at the same time to contend that the Act, as to freezer ships, taxes the taking of the fish?[20] Alaska should not be permitted to thus escape the illogic of its position. As the Court of Appeals pointed out, if Alaska taxes the catching of fish only by use of boats owned by or operated for freezer ships, "a grave due process question would be presented."[21]

The same Alaska legislature which enacted Chapter 97, SLA 1949 also passed Chapter 66, SLA 1949, § 1, which imposed a requirement of a license, conditioned upon payment of a license fee, on "anyone who fishes commercially for, takes or attempts to take salmon

---

[19] As the Court of Appeals opinion pointed out, shore based cold storages freeze fish caught on the high seas. 277 F.2d 120, 126; R. 389 (f.n. 8).

[20] Respondents invite the Court's attention to Ch. 190, SLA 1959, in which the Legislature attempted to do what petitioner states it could not because of the unpopularity among the persons to be taxed; i.e., it purports to impose the tax set forth in Ch. 97, SLA 1949, as amended, on any person taking fisheries products enumerated therein who sells to freezer ships outside the taxing jurisdiction of Alaska.

[21] 277 F.2d 120, 126; R. 389 (f.n. 9).

. . ." By that Act[22] and subsequent legislation, including Chapter 190, SLA 1959, f.n. 20, *supra*, the legislature demonstrated that it knew how to frame a license or privilege tax, the incidence of which would be the taking of fish and that it clearly intended, as the Court below held, that Chapter 97, like Chapter 82, SLA 1949, would require a license for and impose a tax on the processing, not the catching, of fisheries products.

Petitioner's brief urges, at pp. 14-23, that the Act imposes a "severance" tax. At page 24, however, petitioner recognizes that a tax laid on the severance or catching of fish by freezer ships only would be unconstitutional, and goes on to explain that, because of political considerations, the legislature cannot impose a tax on the taking of all fish caught in Alaskan waters. Respondents submit that petitioner thus admits that Chapter 97, SLA 1949, as amended, is not a severance tax, and that neither shore canneries nor shore based cold storage plants are taxed on the taking or severance of fish.

It is clear, as the Court of Appeals held, "that the only tax incident defined in Chapter 116 is the freezing and cold storage of fish aboard freezer ships." It then assumed, without deciding, that this activity occurred within Alaska. 277 F.2d 120, 126; R. 390.

---

[22] Held unconstitutional as to nonresident fishermen as violative of the Commerce Clause by the Court of Appeals for the Ninth Circuit in *Anderson v. Mullaney*, 191 F.2d 123, and by this Court on certiorari, as violative of the Privileges and Immunities clause. *Mullaney v. Anderson*, 342 U.S. 415 (1952).

Respondents' Activity Is An Integral Part of Interstate Commerce

The Court of Appeals properly held that respondents' activity of freezing and storing salmon is an integral part of interstate commerce, and that a privilege tax imposed thereon is forbidden by the Commerce Clause. Freezing and cold storage are essential to interstate transportation of raw salmon, and are performed after the salmon have been loaded aboard vessels for interstate shipment. 277 F.2d 120, 127-128; R. 390-393.

This Court has held that a local activity which is not susceptible of realistic separation from interstate commerce[23] or which is essential to interstate transportation, which begins, at the least, with loading,[24] may not be carved out and made the fulcrum of a local privilege tax.

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) presented facts closely parallel to those in the case at bar, and respondents submit that it is controlling here. In that case a Texas statute levied a tax upon persons engaged in "gathering gas," measured by the entire volume of gas "taken." The taxpayer was a natural gas company which purchased gas from a Texas producer, transported it through its own pipeline facilities, which extended from Texas to Michigan and Wisconsin, and sold it to distribution compa-

[23] *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); *Nippert v. Richmond*, 327 U.S. 416 (1946).

[24] *Joseph v. Carter & Weekes S. Co.*, 330 U.S. 422 (1947); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937).

nies for resale to consumers in those states, as well as Missouri and Iowa. The taxable incident was held to be the taking of gas from the outlet of the independent producer within the state. The gas was metered at the junction of the producer's pipes with those of the taxpayer. The taxpayer then compressed, cooled, scrubbed and dehydrated the gas as it flowed through its compressor station, from which it passed into a single smaller pipeline on its way to markets outside Texas. This Court, in an opinion by Mr. Justice Clark, stated the issue thus presented, as follows:

> "The problem in this case is not whether the State could tax the actual gathering of all gas whether transported in interstate commerce or not, . . ., but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun." 347 U.S. 157, 166-167 (1954).

This Court held unanimously that the taking of the gas into the taxpayer's pipeline could not be separated from the transmission, to form the basis for a local privilege tax:

> "This economic process is inherently unsusceptible of division into a distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other." 347 U.S. 157, 167 (1954).

The Court added that to permit state taxation of the receipt or first taking of the gas into the pipeline by the state of origin would equally sanction such tax as to

the first taking or unloading by the recipient states, and the states through which the pipeline was laid:

> "The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." 347 U.S. 157, 170 (1954).

The tax was therefore repugnant to the Commerce Clause upon the additional ground that it would "permit a multiple burden upon that commerce" (347 U.S. at 170) contrary to the doctrine of *Joseph v. Carter & Weekes S. Co.*, 330 U.S. 424, 429 (1947); *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 439 (1939).

In *Joseph v. Carter & Weekes S. Co.*, 330 U.S. 422 (1947), New York City sought to impose a privilege tax upon gross receipts from the taxpayers' stevedoring business, which consisted of "taking freight from a convenient place on the pier or lighter wholly within the territorial limits of New York City and storing it properly for safety and for handling in or on the outgoing vessel alongside, or of similarly unloading a vessel on its arrival." 330 U.S. at 424-425.

The Court found significance in the fact that:

> "Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." 330 U.S. 422, 427-428 (1947).

The opinion distinguished previous decisions relied on by New York, in which local taxes were sustained against attack under the Commerce Clause, as based upon the existence of a "definite separation between

the taxable event and the commerce itself." 330 U.S. at 433. Those cases were inapplicable because "transportation in commerce, at the least, begins with loading and ends with unloading." 330 U.S. at 427.

Here, as in *Michigan-Wisconsin*, and *Carter & Weekes*, no such separation can be made. Freezing and storage of the salmon are, of course, as essential to, and as much a part of, interstate transportation as are loading and unloading. In fact freezing, since it does not occur until loading is completed, is more a part of the transportation than is loading.[25]

The teaching of the cases relied on by the court below, and by respondents here, is that activity thus closely related to interstate transportation may not be singled out for the imposition of a state privilege tax, both because the state has no power to withhold or condition the privilege of engaging in interstate commerce, and because such commerce would be exposed to the multiple burden of taxation in each state which could show some jurisdictional basis for asserting a tax.

---

[25] Restaurant facilities for the serving of meals to interstate passengers were held an essential and necessary part of a bus carrier's interstate transportation at this term of the Court. *Boynton v. Virginia*, ... U.S. ....., 5 L.Ed. 2d(Adv.) 206 (Dec. 5, 1960); In *Crenshaw Bros. v. Southern Pacific Co.*, 40 Cal. App. 603, 181 Pac. 252, claim was made against a carrier for damage allegedly resulting from imperfect refrigeration of shipments of grapes. The shippers argued that a valuation clause permitted by the Carmack Amendment to the Interstate Commerce Act was not applicable to a claim based upon improper refrigeration, where a separate and distinct charge was made for refrigeration. The court rejected the contention, stating:

> "The charge was distinct, but the refrigeration itself was inseparably connected with the transportation of the fruit, and was an essential part of the transaction." 181 Pac. at 254.

The "Severance" Tax Cases Are Inapplicable

Petitioner relies chiefly on *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1923), and *Toomer v. Witsell,* 334 U.S. 385 (1948). *Oliver* holds that a non-discriminatory state occupation tax levied on persons engaged in the business of mining or producing iron ore is valid and collectible as applied to a taxpayer mining or producing ore within the state, where all but a small fraction of the taxpayer's production is promptly shipped out of the state. In *Toomer v. Witsell,* 334 U.S. 385 (1948) this Court held valid § 3374, S.C. Code Ann., which imposed a non-discriminatory poundage tax of 1/8¢ per pound on shrimp taken in South Carolina waters.[26]

Respondents have no quarrel with the holding of those cases. They simply are not in point here, for Alaska, as petitioner states in its brief, pp. 24-25, has not chosen to tax the catching of fish. Alaska can, if it sees fit, impose a non-discriminatory local privilege tax on the activity of taking fish in its waters, as the Court of Appeals recognized. 277 F.2d 120, 128; R. 393. But petitioner says Alaska cannot enact such a tax, although for political, not constitutional, reasons.

As did the state in *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954), Alaska here has delayed the incidence of the tax beyond the step where interstate commerce has begun, and the authorities

[26] *Toomer* also involved challenges to two other provisions of South Carolina law, § §3379 and 3414, S.C. Code Ann. This Court held the former violative of the Privileges & Immunities Clause, and the latter violative of the Commerce Clause. The holding as to § 3414 is discussed in the next portion of this brief.

concerned with "taking," "extraction," or "severance" are not in point.

II.

Alaska Taxes Freezer Ships for the Privilege of Engaging in Activity Essential to Interstate Shipment and Later Processing of Salmon in Another State, but Imposes No Tax Upon Persons Performing the Identical Activity, if Later Processing Is Performed in Alaska. In Its Practical Operation, Therefore, the Tax Works Forbidden Discrimination Against Interstate Commerce.

Respondents Are Engaged In Interstate Commerce

Having determined the Act sought to tax an activity which is an integral part of interstate commerce, the Court of Appeals was not required to reach respondents' second contention under the Commerce Clause:

> "... that the statute as enacted and administered, discriminates against the interstate transportation of salmon caught in Alaskan waters for canning outside of Alaska and in favor of the canning of such salmon within Alaska." 277 F.2d 120, 125; R. 387.

If this Court should determine that the tax is imposed on the taking of fish, or that the freezing and storage activity of respondents is not an integral part of interstate commerce, the question of whether the tax discriminates against interstate commerce in raw salmon must then be resolved. The facts are not in dispute and the applicable legal principles are not subject to dispute.

This Court has said:

> "But the choice of a local incident for the tax,

> without more, is not enough. There are always convenient local incidents in every interstate operation . . . where there is a state exaction for some interstate privilege that discriminates against interstate commerce, it is invalid even though it is sufficiently disconnected from the commerce to be taxable otherwise." *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 87 (1948).

Respondents' business of acquiring, loading, freezing, storing, canning and marketing salmon, which encompasses activity in Alaska and Washington, as well as on the high seas, is plainly interstate commerce.

The record in this case establishes, as did the record in *Anderson v. Mullaney*, 191 F.2d 123 (1951), aff'd *sub nom Mullaney v. Anderson*, 342 U.S. 415 (1952), that Alaska's fisheries ".... are in the center of a great interstate movement which begins when the fishermen start north to fish and terminates with the delivery of the processed product to the dealers in the states. The catching of the fish is but an interlude in this large flow of commerce." 191 F.2d at 127.

In that case, the Court of Appeals for the Ninth Circuit held that Chapter 66, SLA 1949, which imposed a license tax of $5.00 upon resident fishermen, as compared to a tax of $50.00 on non-resident fishermen, discriminated against the interstate movement of fishermen and was prohibited by the Commerce Clause. It recognized that the taking of fish—the taxable event in that instance—occurred before interstate commerce could be said to have begun but ruled that ". . . if the tax in its practical operation has a discriminatory im-

pact upon some aspect of interstate commerce, the local tax cannot be sustained by simply tying it to a local incident." 191 F.2d at 129. The discrimination in that case was directed against the interstate movement of fishermen. In this case, the commerce affected is the interstate movement of raw salmon for processing in another state, as well as the interstate movement of vessels and fishermen.[27]

The Act Discriminates Against Interstate Commerce

Alaska's fisheries taxation program with respect to persons engaged in the freezing of salmon discriminates against the shipment of raw salmon out of Alaska prior to final processing. As pointed out on page 13, *supra*, a tax of 4% of the value of the salmon frozen for later canning in another state is imposed upon freezer ships while no tax is imposed upon canneries and shore-based cold storages with respect to salmon frozen for later canning in Alaska.[28]

It is patent that the statutory scheme is one of discrimination against the preservation of salmon by freezing for later processing in another state, in order to encourage and promote local processing, and that the necessary effect is to discourage, hamper and burden

[27] The Court of Appeals also indicated that, but for a prior holding of this Court, it would also have invalidated the tax as violating the Privileges and Immunities Clause as well. This Court granted certiorari and affirmed, holding that the Privileges and Immunities Clause did apply to Alaska, thus overruling a prior decision and invalidated Ch. 66, SLA 1949 as violating that clause. 342 U.S. 415 (1952).

[28] And a tax of only 1% of the value of the fish is imposed upon canneries and shore based cold storages, with respect to the freezing of fish which are not later canned in Alaska.

such preservation, shipment and out-of-state processing.

That the operation and effect of its tax program was hostile to interstate shipment of salmon prior to final processing was virtually conceded by petitioner. When it was interrogated, petitioner asserted that, among the differences between freezer ships and "land-based" fish processors which were claimed to support their separate classification for tax purposes, were the fact that freezer ships imported employees, supplies, and equipment, thereby depriving local residents of employment and local business of revenue, and stated as follows:

> "If all of the fish frozen aboard freezer ships were canned or processed in Alaska, instead of the States, it would require a sizeable industry to care for them aside from the fact that the Territory would collect about twice the tax that the freezer ships are now paying." R. 257-260.

Alaska's tax program is to be compared with the state legislation condemned in *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1 (1928) and *Toomer v. Witsell*, 334 U. S. 385 (1948), where Louisiana and South Carolina, respectively, sought, for similar reasons, to prohibit or discriminate against out-of-state processing of fisheries products taken within the state.

In the *Foster-Fountain* case Louisiana enacted a statute which prohibited the export from the state of shrimp from which the heads and hulls had not been removed, but permitted export of shrimp products after processing within the state. This Court held that:

"As to such shrimp, the protection of the commerce clause attaches at the time of the taking." 278 U.S. at 13.

"The purpose . . . [of the enactment] . . . is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants." 278 U.S. at 13.

The Court concluded:

"If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce." 278 U. S. at 13.

In the *Toomer* case, South Carolina required, (by § 3414, S. C. Code Ann.) that vessels licensed to trawl for shrimp in its waters dock at a South Carolina port and unload, pack and stamp their catch before shipment or transportation to other states. This Court held that provision violated the Commerce Clause because: "The necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry" (334 U. S. at 403-404) by diverting to South Carolina employment and business which might otherwise go to Georgia.

In the *Foster-Fountain* case the restriction on interstate shipment of unprocessed shrimp was absolute; in the *Toomer* case, the statute imposed a burdensome regulation which discouraged interstate shipment of the raw product by adding to its cost. Here the statutory scheme seeks to discourage interstate shipment of raw

salmon prior to canning, by use of the taxing, rather than the police power. It is well settled that a legislature may not exercise the tax power to accomplish an otherwise forbidden purpose.

> ". . . The commerce clause . . . by its own force created an area of trade free from interference by the states . . . A state is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states.
>
> "These principles of limitation on state power apply to all state policy no matter what state interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a state under the taxing power, rather than under manifestation of police power in the conventional sense . . . The power to tax is a dominant power over commerce because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a state of a particular source of revenue. Attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce." *Freeman v. Hewit,* 329 U. S. 249, 252-253.

This case follows closely the pattern of the *Foster-Fountain* and *Toomer* cases. They establish that the Commerce Clause protects interstate shipment of raw products for processing in other states. It prohibits embargo, burdensome regulation, and discriminatory taxation alike.

In *Memphis Steam Laundry Cleaner, Inc. v. Stone,*

342 U.S. 389 (1952) this Court held unconstitutional a Mississippi statute which imposed a license tax of $50.00 per vehicle upon persons soliciting business for laundries not licensed in Mississippi as compared with a license tax, imposed under another statute, of $8.00 per vehicle upon persons operating laundries licensed in Mississippi. On the assumption that the tax was imposed on the Mississippi activity of pick-up and delivery, the Court held that state taxation of local activity was permissible "only where no discrimination against interstate commerce appears either upon the face of the tax laws or in their practical operation." This tax was invalid because it ". . . . made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause." (342 U.S. at 395.)

The parallel is obvious, but here the discrimination is more severe. A taxpayer who obtains and freezes salmon for later canning in Alaska will pay no tax with respect to the activity of freezing the salmon in Alaska, while a taxpayer who obtains and freezes salmon for later canning in another state must pay a tax of 4% of its value with respect to the same activity.

The fact that Alaska taxes local canneries for the privilege of canning salmon at the rate of 6% of the value of the raw fish (Chapter 82, SLA 1949 as amended by Chapter 113, SLA 1951) is irrelevant.

> "It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exer-

tion of its authority against commerce in the national domain is to compare incomparables." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

"While a state, in some circumstances, may by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, . . . it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute." *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U.S. 33, 56 (1940).

The apparent thrust of this argument is that since respondents are essentially producers of canned, rather than fresh frozen salmon, they cannot complain of an Alaskan tax which taxes them less heavily than Alaska taxes local canners. The contention ignores the fact that respondents can in Washington and pay its Business and Occupation Tax for so doing.

This Court has many times held that a tax on the intrastate portion of an interstate enterprise must be imposed solely on account of the intrastate activity, and its amount may not be increased because of the interstate activity.[29]

Alaska, by taxing the freezing of salmon only where preliminary to out-of-state canning, while leaving untaxed the freezing of salmon where preliminary to local canning, has attempted to benefit local enterprise at the expense of interstate commerce.

The contention that a tax so laid is not repugnant to

[29] *Cooney v. Mountain States T. & T. Co.*, 294 U.S. 384, 392-393 (1935); *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465, 470 (1931); *Sprout v. South Bend*, 277 U.S. 163, 171 (1928).

the Commerce Clause is best answered in the language of this Court, in *Best & Co. v. Maxwell,* 311 U.S. 454, 455-456 (1940):

> "'The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce'."

The standards established by this Court condemn the tax at bar.

III.

Summary

Respondents Challenge the Tax Under the Due Process, Equal Protection and Privileges and Immunities Clauses of the Constitution. Grave Questions Are Presented Under Those Provisions, If the Tax Is Held Not Repugnant to the Commerce Clause. If Those Issues Are Reached, the Cause Should Be Remanded to the Court of Appeals, Which Has Not Passed Upon the Questions Thereby Presented.

Other Constitutional Issues

Respondents challenged the constitutionality of application of Chapter 97, SLA 1949, as amended, to them, under the Due Process Clauses of the Fifth and Fourteenth Amendments, and the constitutionality of the classification made by Alaska's fisheries taxation program among those engaged in the business of freezing fish, under the Privileges and Immunities Clauses of Article IV, Section 2, and Section 1 of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. (See, *e.g.,* Answer of Arctic Maid, Second and Fifth Defenses, R. 14, 18.)

The Due Process Clause

Under the Due Process defense, it is respondents' contention that Alaska is here seeking to tax activities of respondents (the receipt of freezing of fish and subsequent operations) carried on outside its borders,[30] which in the case of Bristol Bay are defined by a line drawn parallel to and at a distance of three miles seaward from mean low tide-mark on the coastline of Alaska.[31]

The District Court recognized that most of respondents' freezing was carried on outside the territorial waters of Alaska, but held that respondents were nevertheless taxable, because the fish so frozen were caught inside such waters. 140 F.Supp. 190, 195; R. 60, 64-65.

The Classification Defense

Respondents also contend that the classification made by Alaska among those engaged in the freezing of salmon, discussed in detail at pp. 13, 27, *supra,* of this brief, is unconstitutional.

Legislative classification, attacked under the Equal Protection or Privileges and Immunities provisions of the Constitution, must rest upon some ground of dif-

---

[30] *Safe Deposit & Trust Company v. Virginia*, 280 U.S. 83, 93 (1929): "A statute of a state which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment."

[31] *Cunard Steamship Co. v. Mellon*, 262 U.S. 100 (1923); See also "Freedom of the Seas; The Present State of International Law," by Oscar R. Houston, 42 ABAJ 235 (1956).

ference having a fair and substantial relation to a permissible object of legislation.[32]

This constitutional issue arises against the background of The White Act, *supra*, p. 4, which has been held to negative "both Territorial proprietorship, and Territorial power to regulate fisheries,[33] and guarantee to citizens the right to take and preserve fish on a basis of substantial equality.[34]

In this case, Alaska did not establish that reasonable relation between the higher tax rate of 4% imposed upon respondents' Alaskan activity, as compared with the 1% rate imposed upon shore cold storage plants, and the absence of any tax upon freezing for later canning by Alaska canneries, and the higher cost of enforcement which this Court found to be required under the Privileges and Immunities clause in *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952).[35]

Suggested Treatment

Respondents believe, as did the Court of Appeals, that this case should be decided under the Commerce

[32] *Roysier Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 583 (1935): "The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the object with respect to which the classification is made."

[33] *Anderson v. Mullaney*, 191 F.2d 123, 132 (9th Cir. 1951) affirmed 342 U.S. 415 (1952).

[34] *P. E. Harris & Co. v. Mullaney*, 87 F. Supp. 248, 253 (D. C. Alaska, 1949).

[35] The evidence was that Alaska spent $50 in 1949 and $100 in 1950 (prior to the quadrupling of the tax rate on freezer ships by Chapter 116, SLA 1951) above routine office expenses in the attempted enforcement of the tax on freezer ships. R. 255-257.

Clause, and that the Court need not reach the other issues raised and preserved by them. If, however, this Court's consideration of the Commerce Clause does not dispose of the case, respondents join with petitioner's request that the cause be remanded to the Court of Appeals for the determination of other issues.

CONCLUSION

Respondents urge the Court to affirm the judgments of the court below, R. 393-398. To do otherwise, "would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 170 (1954).

Respectfully submitted,

EVANS, MCLAREN, LANE, POWELL & BEEKS
MARTIN P. DETELS, JR.
G. KEITH GRIM
Attorneys for Respondents.

APPENDIX A

Chapter 97, SLA 1949:

AN ACT

Imposing license taxes upon certain business in Alaska's commercial fisheries; providing license requirements, defining violations, prescribing penalties, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following licenses [license] taxes which are hereby levied:

(a) Cold storage and other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor under lease or other arrangement.

Section 2. APPLICATION FOR AND ISSUANCE OF LICENSES: PAYMENT OF TAX. During any year, including the year 1949, before engaging in any business mentioned in Section 1 of this Act, application so to do must first be filed with the Tax Commissioner accompanied by an initial fee of $25.00. A separate initial fee shall be required for each plant specified in the application to be covered by the license. In such application, which may be made upon forms furnished by the Tax Commissioner, the applicant shall state his or her name, the line of business to be licensed, place or places where said business is to be carried on and such other facts as the Tax Commissioner prescribes. The applicant shall also state that he agrees to pay the license tax and will make a true return and will pay to the Tax Commissioner such tax on or before the fifteenth of the next ensuing January. Upon the receipt of the application in proper form accompanied by the initial fee, the Tax Commissioner shall issue the license as of the date the application is filed or mailed, and the applicant may carry on the business from and after the date the application was actually made.

Section 3. TAXPAYER'S DUTY AS TO RETURNS, RECORDS, STATEMENTS, ETC.: TIME TO PAY TAX: TAX COMMISSIONER'S RETURN. The requirements for making returns, the time and place for payment of tax, and the obligation to keep records and make same available to the Tax Commissioner shall be the same as prescribed in the business license tax law for salmon canneries.

Section 4. VIOLATIONS AND PENALTIES, ETC. Any violation of this Act or the rules and regulations issued hereunder shall be a misdemeanor subject to punishment as prescribed in the business license tax law for salmon canneries. Likewise the liability to

file returns and pay interest and deficiency assessments, and the subjection of property to liens shall be the same as prescribed in the license tax law for salmon canneries.

Section 5. SEVERABILITY CLAUSE. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 6. EMERGENCY CLAUSE. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 24, 1949.

APPENDIX B

Sections 1 and 2, Chapter 66, SLA 1949:

AN ACT

Pertaining to Fisheries; to provide for the licensing of fishermen in the Territory of Alaska; requiring license fees; defining violations and prescribing penalties; repealing Section 39-41-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated, 1949; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resource of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling of fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fisherman, $5.00; non-resident fishermen, $50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bone fide inhabitant of Alaska for at least six months during each calendar year thereafter, and

who maintains his place of abode in Alaska. A nonresident is a citizen who has not resided in Alaska for the 12 months immediately preceding application for license or who maintains his principal business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

FILE COPY

Office Supreme Court, U.S.
FILED
FEB 9 1961
JAMES R. BROWNING, Clerk

A non-
aska for
ition for
or place
on not a
an alien
ention to

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

STATE OF ALASKA, *Petitioner*,
v.
ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
ALASKA REEFER and ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
NORTH STAR and NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

RALPH E. MOODY
Attorney General of Alaska
GARY THURLOW
Deputy Attorney General
RICHARD A. BRADLEY
Assistant Attorney General
Counsel for Petitioner
430 Capitol Building
Juneau, Alaska

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

ARGUMENT: Page

I. The Incidence of the Tax on Freezer Ships is on the Carrying on of Any Part of a Freezer Ship Line of Business Within Alaskan Waters. It Is Not in the "Freezing of Fish." The Thrust of the Tax Is Against a Local Activity Carried on in One or Two Places for the Entire Season, But Not on the Interstate Movement of the Ships Themselves 2

II. Although All Fish Processors in Alaska Pay a Business License Tax, Freezer Ships May Not Complain Because Canneries Are Taxed at a Higher Rate. Freezer Ships Are Not in Competition With Land-Based Cold Storages and May Not Complain About a Different Industry Being Taxed at a Different Rate 8

III. No Due Process Rights of Respondents Are Being Violated Since Alaska Is Taxing No Activity Outside of Its Jurisdiction. Respondents Are Not Wronged by Being Assessed a Lower Tax Than Their Competitors 15

CONCLUSION 16

CITATIONS

CASES:

Crenshaw Bros. & Saffold v. Southern Pac. Co., 40 Cal. App. 603, 181 Pac. 252 (1919) 5, 6
Mich.-Wisc. Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 4, 5
Mullaney v. Anderson, 342 U.S. 415 (1952) 8
Oliver Iron Co. v. Lord, 262 U.S. 172 (1923) 16
Singer Sewing Mach. Co. v. Brickell, 233 U.S. 304 (1914) 14
Toomer v. Witsell, 334 U.S. 385 (1948) 8

STATUTES:

Sec. 39-2-19, ACLA 1949 13
Chapter 43, Session Laws of Alaska 1949 11
Chapter 66, Session Laws of Alaska 1949 8
Chapter 94, Session Laws of Alaska 1959 13
Chapter 116, Session Laws of Alaska 1949 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

STATE OF ALASKA, *Petitioner*,

v.

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

ALASKA REEFER and ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTH STAR and NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

ARGUM

I

The Incidence of the Tax on Freezer Ships Is on the Carrying on of Any Part of a Freezer Ship Line of Business Within Alaskan Waters. It Is Not on the "Freezing of Fish." The Thrust of the Tax Is Against a Local Activity Carried on in One or Two Places for the Entire Season, But Not On the Interstate Movement of the Ships Themselves

The respondents profess to be confused regarding petitioner's position as to the incidence of the tax. We wish to make it absolutely clear that we believe that there can be only one incidence of the tax and that incidence of the tax is the incidence named in the first paragraph of Ch. 116, SLA 1951—namely, the prosecution or attempt to prosecute the freezer ship line of business in connection with Alaska commercial fisheries. We believe that the Ninth Circuit Court of Appeals was right the first time it heard the case. At that time the taxable incident was found to be that part of the freezer ship business prosecuted in connection with Alaska commercial fisheries *within the limits of Alaska's taxing jurisdiction.* We believe that the Ninth Circuit in its opinion of March 23, 1959 was correct when it stated that freezer ships were prosecuting a freezer ship line of business in connection with Alaska's commercial fisheries when they sent their boats into Alaska waters to take fish from those waters. Freezer ships carry on a number of different activities during the course of prosecution of a freezer ship line of business within the limits of Alaska's taxing jurisdiction. Among these taxable business activities are the search for fish, the catching of fish, and when the freezer ship is within Alaska waters (and we eventually hope to obtain a juridical determination that Alaska waters include much of

Bristol Bay—see Pet. Br. 12, n. 1), it also includes the unloading of the catcher boats into the mother ship, the freezing of the fish, the moving of the fish back and forth on the ships for better storage, and anything else the freezer ship may do while it is in Alaska's taxing jurisdiction for the purposes of obtaining fish and of freezing the fish immediately thereafter. The state has no desire to leave its taxing jurisdiction to tax any activities of freezer ships occurring outside of Alaska's taxing jurisdiction.

This tax is not a startling departure from the usual concept of a business license tax. Business license taxes are generally on the totality of the business carried on within the taxing jurisdiction. There is no reason to assume that the Alaska freezer ship tax was designed to be anything different.

We believe that courts have erred on two occasions in finding the taxable incident, and they erred because they strayed beyond the language defining the incidence of the tax and wandered into the language describing the measure of the tax. We must confess that when the trial court did this the Territory of Alaska was pleased since under its construction of the statute every fish obtained and processed by freezer ships contributed to Alaska tax revenues. However, now that we have the reasoning of the three-judge panel of the Ninth Circuit Court of Appeals available to us we believe that Court found the law the first time it heard the case. It held that freezer ships outside of Alaskan waters which operate catcher boats within such waters must accept tax responsibility for the fish so obtained. It also held that obtaining fish is an integral part of the operation of the freezer ships and that the catcher boats operated by the freezer ship

itself are but an extension of that ship's operations. We also agree that if freezer ships stay completely outside Alaska's taxing jurisdiction and do not send any of their boats within Alaska waters, there is no way Alaska can reach these ships by its taxes. We believe that when the Court of Appeals went beyond the incidence of the tax in the second opinion and looked to its measure, it erred in much the same way as the trial court. This time we were not pleased by the error, since if the freezer ships are not taxable for their severance operations, are taxable only on their processing operation, and process entirely outside of Alaska's taxing jurisdiction (which may be the situation in part or most of the cases) Alaska's tax revenues would be correspondingly diminished.

Mich.-Wisc. Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954), is evidently respondents' leading case. Respondents state at page 20 of their Brief:

> "In that case a Texas statute levied a tax upon persons engaged in 'gathering gas,' measured by the entire volume of gas 'taken.'"

The Court had good reason for placing the word "taken" in quotes in its opinion and respondents are correct in leaving it in quotes, since the "taken" found in the Texas statute does not connote the usual concepts that "taken" evokes. It also has a different meaning from the word "taken" in the Alaska freezer ship statute. In the *Michigan-Wisconsin* case the word "taken" is synonymous with "received for shipment in interstate commerce." See 347 U.S. at 167. It has no connection with the production of gas. A tax on the "gathering" of gas or on the "taking" of gas, not being a tax on its production, is a tax which is delayed

beyond the step where production and processing has ceased and transmission in interstate commerce has begun. 347 U.S. at 167. The Alaska tax is not delayed beyond the step where production has ceased. The Alaska tax occurs at a time immediately before and immediately after taking occurs. This production is a distinctly local activity capable of forming the basis of the tax imposed. The problem is complicated since the fish "produced" are processed immediately after they are caught so that they will retain their value. However, if that activity occurs outside of Alaska's taxing jurisdiction it could not be of interest to this Court or to us. If it occurs within the three-mile limit or within an inland bay of the State of Alaska, then, of course, it is an activity which the Alaska freezer ship tax is designed to reach, and as we have argued in our earlier Brief, is a distinctly local activity, just as is the taking of the fish.

Freezer ships are not carriers engaged in interstate commerce, waiting to receive gas or grapes for shipment. The facts of this case are not similar to *Crenshaw Bros. & Saffold* v. *Southern Pac. Co.*, 40 Cal. App. 603, 181 Pac. 252 (1919); Resp. Br. 23, n. 25. In that case, claim was made against the railroad company for damage allegedly resulting from imperfect refrigeration of shipments of grapes. The shippers argued that a valuation clause permitted by the Carmack amendment to the Interstate Commerce Act was not applicable to a claim based upon improper refrigeration, where a separate and distinct charge was made for refrigeration. The Court rejected the contention, stating:

> "The charge was distinct, but the refrigeration itself was inseparably connected with the trans-

portation of the fruit, and was an essential part of the transaction." 181 Pac. at 254.

The *Crenshaw* case very well illustrates the difference between a carrier engaged in interstate commerce and a freezer ship operation which is relatively stationary for a prolonged period of time and which is engaged in the extraction of resources within a state. In the *Crenshaw* case the carrier had nothing to do with the production of the grapes which it undertook to deliver in good condition. In the *Crenshaw* case it was not the producer who undertook responsibility for preserving the product until it could be started on its way to another state.

The Ninth Circuit observed in dicta at 277 F.2d 120, 125, R. 387, that if the tax were construed to include such extraterritorial activity as the movement of the freezer ship to and from the fishing grounds in Alaska, the tax would be invalid under the due process clause of the Fifth and Fourteenth Amendments. Yet in hypothesizing applications of the law to various factual situations, it is wise to realize that the thrust of the law is not against movement of ships from Washington to Alaska and back, but is rather aimed at an industry that, as a practical matter, completes all its activities in one area. Plaintiff's Stipulation #1, Exhibit #1 at R. 39 indicates that when freezer ships are in the process of getting fish, their mobility is severely limited. To be of utility they must "maintain a reasonably straight line so that their anchors will not foul." Catcher boats also "must be given room" (R. 39). Homer Kyros, captain of the *Arctic Maid,* stated in his deposition that the freezer ships "anchor off of [sic] the beach in certain designated areas—I say designated—from year to year there are certain anchorages

that we picked out, and *we drop our anchor there for the season*, ..." (R. 262-263). (Italics added.)

This is not the role usually played by companies engaging in interstate transportation. No readjustment in application or change in law is required to apply the law to Alaskan owned and operated ships which might or might not be conducted by a local cannery, more or less as a "field operation." These ships would have Alaskan home ports and would conduct all their business activities within Alaskan waters. Therefore, no aspects of the tax inevitably reach interstate commerce since, if locally owned, the boat may never move or need to move for a profitable operation from its field of operations.

We emphasized in our earlier Brief the dangers inherent in confusing the act of freezing with the subsequent and entirely separate act of transporting the frozen product to another state. See Pet. Br. 13-14. By considering a hypothetical and yet possible application of the law to a purely Alaskan operation, and by showing the ease with which the tax would apply to this Alaskan operation, we hope we have indicated to the Court how divorced the transportation is from the freezing. When transportation is shown to be an incidental aspect of the freezer ship line of business, the clearly *intra*state aspects stand out in their true perspective.

II

Although All Fish Processors in Alaska Pay a Business License Tax, Freezer Ships May Not Complain Because Canneries Are Taxed at a Higher Rate. Freezer Ships Are Not in Competition With Land-Based Cold Storages and May Not Complain About a Different Industry Being Taxed at a Different Rate

Chapter 66, SLA 1949, which imposed a license tax of $5.00 on resident fishermen as compared to a tax of $50.00 on non-resident fishermen and which was later found to be unconstitutional [*Mullaney* v. *Anderson*, 342 U.S. 415 (1952)] is irrelevant to this case. Although the text of the tax act does not explain any underlying purpose it does not appear to be a revenue tax, but rather a regulatory license fee.[1] Moreover, the tax is on individual fishermen and is not on the severance of fish. If it is true that the tax is a regulatory tax, some discrimination between residents and non-residents would be justified because of the greater expense of keeping track of non-resident fishermen (but not a ten-to-one discrimination). See *Toomer* v. *Witsell*, 334, U.S. 385 (1948). Even if Ch. 66, SLA 1949 is a revenue-raising tax rather than a regulatory tax, it is difficult to see why the existence of that revenue tax would have any relevance to a business license tax levying taxes on businesses according to the value of fish obtained for processing. They are greatly different taxes and are administered in different fashions.

[1] Section 5 of the Act requires each buyer of fish to keep a record of each purchase showing the name of the boat from which the catch involved is taken, the amount purchased and the names of all persons on the boat who participated in the trip on which the fish or shellfish were taken, and makes it unlawful for anyone to buy fish from an unlicensed fisherman. This suggests registration for purposes of keeping track of the intensity of the fishing effort.

Respondents state the purpose of the freezer ship tax is to discourage shipment and out-of-state processing of raw salmon (Resp. Br. 28), and cite a statement elicited from one of the tax collectors of the Department of Taxation as authority for the statement (Resp. Br. 28, R. 259-260). An isolated statement of an isolated territorial tax collector should have very little evidentiary value in determining the legislative intent in enacting the freezer ship tax. The legislative intent should be found by considering all of the Alaska fish processing taxes as a whole together possibly with any of the legislative history that may be available. Unfortunately no legislative history is available.

All fish processors engaged in business in connection with Alaska fisheries pay a tax as a result of their engaging in business. See Pet. Br. 6. Because the amount of fish processed is the measure of the tax all fish bought or obtained by fish processors doing business in Alaska contribute to some extent to Alaska tax revenues. Canneries are taxed most heavily in Alaska. They are taxed on their business operations in Alaska under a tax at 6 per cent of the value of the salmon bought or otherwise obtained for canning. Freezer ships are taxed less than either canneries or cannery ships since they are taxed at a rate of 4 per cent of the value of raw fish bought or taken for freezing. This is understandable since, although canneries and freezer ships are interested in obtaining the same species of fish for the same ultimate purpose, the total volume of business activities of freezer ships is less than the total volume of business of Alaska canneries. Salmon, halibut, shellfish, and other fish bought for processing through freezing, salting, or other methods, are taxed at 1 per cent. This is understandable because cold

the United States District Court to decide the amount of taxes actually due the State upon remand.

Respectfully submitted,

RALPH E. MOODY
Attorney General of Alaska

GARY THURLOW
Deputy Attorney General

RICHARD A. BRADLEY
Assistant Attorney General
430 Capitol Building
Juneau, Alaska

Counsel for Petitioner,
State of Alaska

Dated this 9th day of
February, 1961, at
Juneau, Alaska.

storages are not interested in buying fish "in the round," but rather buy higher quality fish at higher prices which have been treated much more carefully than cannery-destined fish, and which in the great majority of the cases have been cleaned (R. 243-244). Cold storages are interested particularly in king salmon and silver salmon, while canneries are interested largely in red, pink and chum salmon, and to some extent silver salmon (R. 234-235 and 263). Freezer ships are particularly interested in red salmon since the bulk of the fish they catch are caught in Bristol Bay where red salmon predominate. The fact is that there are three different industries here. Canneries and freezer ships are perhaps the most similar in nature in that they are interested in the same type of fish.

Moreover, shore-based cold storages freeze fish for the fresh frozen consumer market; they are not in competition with freezer ships who can all their fish (R. 240-251). Fish frozen by a cannery but not canned are likewise not in competition with the freezer ships' product. Fish obtained by Alaska canneries for canning are in competition with fish obtained by freezer ships, but the freezer ship companies have no reason to complain since the tax on the fish obtained by freezer ships is less than the tax on fish obtained by canneries.

The respondents make much of the fact that a taxpayer who obtains and freezes salmon for later canning in Alaska will pay no tax with respect to the activity of freezing the salmon in Alaska, while a taxpayer who obtains and freezes salmon for later canning in an other state must pay a tax of 4 per cent of its value with respect to the same activity. The Ninth Circuit in its opinion of March 16, 1959, answered this contention:

> "We see no significance in the fact that the Alaskan canneries do not pay a tax at the freezing stage on fish which they later can. This is only an illusionary benefit for such fish will be taxed at the 6 per cent rate before they enter the market to compete with appellants' product. The same is true of the fact that the Territory does not collect the 1 per cent freezing tax from shore-based cold storages on fish which are later canned in Alaska, for these fish are likewise subject to the 6 per cent canning tax before they enter the canned salmon market." (Pet. Br. App. 6a)

It would have been more logical for the Legislature to have required cold storages to pay taxes for salmon which are frozen for later canning in Alaska. In fact, it may well be that the statute does require this and that the administrative practice of not requiring this tax is totally erroneous and without any foundation in law. A business license tax or a gross receipts tax is generally measured by some index of the business activity of the business to be taxed, and in the case of a cold storage any freezing of fish for later canning would logically be part of the measure by which the total tax liability should be calculated.[2]

Accordingly, it would appear that the Department of Taxation may have erred in not considering the

---

[2] For example, the volume of business activity might be measured by net income, as is the case with the Alaska business license tax applicable to banks, both state and federal. The business license tax on banks is measured by the net income of the banks and is 2 per cent of the net income. See Sec. 5(b), Ch. 43, SLA 1949. The volume of business activities of the great majority of Alaska businesses is measured by their gross receipts. Sec. 5(a) of Ch. 43, as amended by Ch. 128, SLA 1955 provides for a license fee of $25 plus a sum equal to one half of one per cent of the gross receipts in excess of $20,000 with a tax of one quarter of one per cent on all gross volume in excess of $100,000.

salmon frozen by cold storages for later canning in calculating their taxes. This is understandable since freezing of salmon for later canning is an isolated and unusual activity for a cold storage (R. 343). It is not an activity which the Legislature would necessarily be expected to take into consideration in framing a reasonable business license tax program applicable to all fish processors doing business in Alaska, nor is it a business activity which the Department of Taxation would be expected to take any particular note of. No one thinks of cold storages as being in the business of freezing salmon for later canning. This type of activity only takes place in emergency conditions such as when fish suitable for canning purposes are caught early in the season before the canneries have opened (R. 344). In some cases cold storages will hold these salmon and keep them frozen until the canneries open.

The cold storages in Alaska seldom freeze fish "in the round" for canneries. Wallis George, president and manager of the Juneau Cold Storage Company, stated in his deposition (R. 344) that during his 27 years with the company it had only happened two or three times. It occurs "only when the run is so heavy that they can't take care of them in their own canning plants" (R. 344).

At page 234 of the Transcript of Record, James G. Pinkerton, manager of the Ketchikan Cold Storage, was questioned regarding the amount of fish frozen for later canning by a land-based cold storage. He stated that as a matter of courtesy to their fishermen the cold storages would take fish undesirable for the fresh frozen market and can them (R. 234-235). At page 239, however, Mr. Pinkerton admitted that it was not ordinarily done in the course of business and that

it was an "isolated, incidental thing." Laws of the Territory and State prohibit the wasting of a natural resource. See 39-2-19, ACLA 1949; Sec. 27, Art. I, Ch. 94, SLA 1959. Natural business economics demand that these fish be used, though undesirable for fresh frozen purposes. However, this type of operation is outside the usual scope of business of land-based cold storages.

Furthermore, although cold storage operators take all fish, whether the type desired for their particular operation or not, they would prefer to avoid freezing fish that will be canned later. It is a process that is "expensive" and the duplication is avoided if possible.[3]

Several distinctions between the business of freezer ships and the land-based cold storages are apparent. Freezer ships freeze their fish by the "brine method,"[4] explained very well in Respondents' Brief at 8-9, whereas cold storages use the "sharp freeze method" indicated in the testimony of Homer Kyros (R. 270). If this were the only difference, the tax classification would probably not be justified.

---

[3] Deposition of Thomas Sidney Parke: Q. Do you know whether such operations [Our note: Cold storage for later canning] have been conducted at, for instance, the Pelican Cold Storage and Pelican Packing Company? A. Yes, I do know that the Pelican Cold Storage preserved fish—I am not so sure of the year, but I believe it was '49, the year they had a big run and they weren't prepared for it. The canneries weren't geared for it, but I don't know of the Pelican Cold Storage holding fish for the Pelican Canning Company. I know that is a very expensive operation to actually do both types, so it isn't readily done. Q. How do you know it is expensive? A. Just from facts I have been told throughout the operation. They avoid it if they possibly can. (R. 252)

[4] The Pacific Queen in the 1951 season only used the "air blast" method. Resp. Br. 9.

However, it is not the only distinction. The land-based cold storage is as it states—land-based, whereas the other is a transient operation. See R. 258, 281, 289-90. This situation has been recognized by this Court as an "evident difference in the mode of doing business." *Singer Sewing Machine* v. *Brickell*, 233 U.S. 304 (1914).

Then again the land-based cold storages are in no way competitive with freezer ships. The freezer ships and the floating cold storages freeze fish for later canning only, while most of the fish taken by the land-based cold storages are frozen for the fresh fish market (R. 74). The differences in the disposition of the fish require substantially different treatment of the fish. Fish frozen for canning are frozen "in the round" while fish frozen for the fresh fish market are cleaned shortly after their taking. Freezing "in the round," with the entrails still in the fish, tends to lower the final quality and flavor of the fish while the immediate cleaning and freezing of fish after they are caught results in a higher quality fish (R. 240, 301-302). Freezer ships also take seine-caught salmon while the land-based cold storages obtain the more valuable and higher priced trolling-caught kings and cohoes (R. 74).

The freezer ship does not suffer from discrimination when compared to a cannery, since the tax on freezer ships after all the freezer ship operations are lumped together will not exceed 6 per cent whether or not the freezer ships freeze any of their fish or whether or not any of the freezing of the freezer ships occurs within Alaska's taxing jurisdiction. If the freezer ships do any part of their business in Alaska their tax will be 6 per cent even though there is no freezing of fish which Alaska taxes could reach. By the same token,

canneries in Alaska are subject to the 6 per cent tax no matter how many or how few business activities they engage in in the process of canning fish. The tax would be the same whether or not they caught, loaded, unloaded, de-headed or froze their fish. Certainly, it would be unreasonable to tax an Alaska cannery an additional 4 per cent tax, a 1 per cent tax, or any tax, if it should freeze its salmon before canning it, since the tax is not on the canning, or the freezing, or the unloading of the fish on a cannery dock, or the de-heading, or any other single phase of the cannery activity, but as in the case of a freezer ship operation, is on the entire business activity occurring in Alaska.

III

No Due Process Rights of Respondents Are Being Violated Since Alaska Is Taxing No Activity Outside of Its Jurisdiction. Respondents Are Not Wronged By Being Assessed a Lower Tax Than Their Competitors

We believe that this Court should decide the due process clause question and classification defense raised by the respondents, since this Court would necessarily consider both questions when passing on the issue of discrimination. The due process defense is clearly inapplicable since Alaska does not seek to tax any of the activities of the respondents carried on outside of the taxing jurisdiction of the State of Alaska. The classification defense is inapplicable if the discrimination argument is found wanting since the respondents cannot show themselves wronged by the 4 per cent tax on their activities as opposed to the higher tax imposed on cannery activities. The fact that shore-based cold storages are taxed at 1 per cent is of no relevance since

they are engaged in totally different type of business and are not in competition with either canneries or freezer ships.

However, there is one remaining ground which the Ninth Circuit Court of Appeals should pass on in the event that this Court should decide for the State of Alaska on both of the interstate commerce questions. Some court must determine the extent of Alaska's taxing jurisdiction in order to enable an Alaska court to determine the exact amount of the tax liabilities of the freezer ships. Under any ruling of this Court or of the Ninth Circuit Court of Appeals regarding the extent of Alaska's taxing jurisdiction, it appears that there will probably be some freezer ship operations of the freezer ship companies which will be totally outside of Alaska's taxing jurisdiction and which will be totally exempt from any Alaska taxes whatsoever. This means that certain issues of fact will eventually have to be determined by a trial court as outlined in the conclusion of the opinion of the Court of Appeals dated March 16, 1959, since withdrawn. (See Pet. Br., App. 18a).

CONCLUSION

Petitioners urge the Court to uphold Alaska freezer ship tax on the ground that it is a tax on a local activity and is not designed to discriminate against interstate commerce. *Oliver Iron Co.* v. *Lord,* 262 U.S. 172 (1923). This Court should also remand the case to the Ninth Circuit Court of Appeals to determine the extent of Alaska's taxing jurisdiction and thereby allow

TABLE OF CONTENTS

ARGUMENT: Page

I. The Incidence of the Tax on Freezer Ships is on the Carrying on of Any Part of a Freezer Ship Line of Business Within Alaskan Waters. It Is Not in the "Freezing of Fish." The Thrust of the Tax Is Against a Local Activity Carried on in One or Two Places for the Entire Season, But Not on the Interstate Movement of the Ships Themselves 2

II. Although All Fish Processors in Alaska Pay a Business License Tax, Freezer Ships May Not Complain Because Canneries Are Taxed at a Higher Rate. Freezer Ships Are Not in Competition With Land-Based Cold Storages and May Not Complain About a Different Industry Being Taxed at a Different Rate 8

III. No Due Process Rights of Respondents Are Being Violated Since Alaska Is Taxing No Activity Outside of Its Jurisdiction. Respondents Are Not Wronged by Being Assessed a Lower Tax Than Their Competitors 15

CONCLUSION 16

CITATIONS

CASES:

Crenshaw Bros. & Saffold v. Southern Pac. Co., 40 Cal. App. 603, 181 Pac. 252 (1919) 5, 6
Mich.-Wisc. Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 4, 5
Mullaney v. Anderson, 342 U.S. 415 (1952) 8
Oliver Iron Co. v. Lord, 262 U.S. 172 (1923) 16
Singer Sewing Mach. Co. v. Brickell, 233 U.S. 304 (1914) 14
Toomer v. Witsell, 334 U.S. 385 (1948) 8

STATUTES:

Sec. 39-2-19, ACLA 1949 13
Chapter 43, Session Laws of Alaska 1949 11
Chapter 66, Session Laws of Alaska 1949 8
Chapter 94, Session Laws of Alaska 1959 13
Chapter 116, Session Laws of Alaska 1949 2

the United States District Court to decide the amount of taxes actually due the State upon remand.

Respectfully submitted,

RALPH E. MOODY
Attorney General of Alaska

GARY THURLOW
Deputy Attorney General

RICHARD A. BRADLEY
Assistant Attorney General
430 Capitol Building
Juneau, Alaska

Counsel for Petitioner,
State of Alaska

Dated this 9th day of
February, 1961, at
Juneau, Alaska.

SUPREME COURT OF THE UNITED STATES

No. 106.—October Term, 1960.

State of Alaska, Petitioner, v. Arctic Maid, et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 1, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

While Alaska was a Territory, the Territorial Legislature amended, L. 1951, c. 116, its taxing statutes to read, in relevant part, as follows:

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

. . . . . .

"(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the

raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement."

Respondents[1] use freezer ships for the taking and preservation of salmon along Alaska's shores. These freezer ships use "catcher boats" which respondents own or have under contract and which catch salmon off Alaska. The freezer ships sometimes purchase salmon from independent fishermen.

Bristol Bay is a famous fishing ground for salmon. When operating in the Bristol Bay area, the freezer ships anchor more than three miles from the coast, because of the shallow waters in Bristol Bay. They serve as a base for their catcher boats that fish within the territorial waters. In other areas both the freezer ships and the catcher boats stay within the territorial waters.

When the catcher boats—which are shallow-draft and known as gillnetters—have a load or desire to discontinue fishing or when the open season ends, they return to the "mother" ship and unload. The salmon are usually dumped into quick-freezing brine tanks. At other times they are placed in freezing compartments and frozen by blasts of air. The freezer ships eventually return to Puget Sound in the State of Washington where the salmon are canned.

Alaska, when a Territory, brought these suits in the District Court of Alaska for taxes claimed to be due and owing under the foregoing Act. The District Court entered judgments for the plaintiff. 140 F. Supp. 190.

---

[1] One of the respondents is a Washington corporation. Four remaining respondents are partnerships all of whose members are citizens of the United States and residents of either California or Washington. The Pacific Reefer Co. is the owner of the ship Reefer II, as to which a tax lien is asserted to exist by virtue of the activities of a previous owner. It too is a foreign corporation.

It held that the taking of the fish was the taxable event, not the freezing of the fish.

On appeal the Court of Appeals held that respondents were taxable for fish caught by their catcher boats within territorial waters, even though the freezer ships remained outside the three-mile limit. In its view the catcher boats "operated by the freezer ship itself are but an extension of that ship's operations." It held, however, that respondents were not responsible for taxes on fish taken "by independent catcher boats but purchased by the freezer ships" outside territorial waters. There was a rehearing *en banc* and on the rehearing the Court of Appeals held that the tax incident was not taking fish but "the freezing and cold storage of fish aboard freezer ships." It held that the tax could not be levied even if the freezer ships received the salmon in territorial waters. It reasoned that the freezing and storage of the fish was an inseparable part of interstate commerce and could not be taxed locally anymore than the loading and unloading of interstate carriers. Cf. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69. Accordingly it reversed the District Court. 277 F. 2d 120. The case is here on a petition for certiorari which we granted because of the importance of the ruling to the new State of Alaska. 364 U. S. 811.

We put to one side the specialized cases such as *Richfield Oil Corp.* v. *State Board*, *supra*, which arise under the Export-Import Clause of the Constitution (Art. I, § 10, cl. 2) because none of the salmon involved in these cases was destined to a foreign country. We also consider irrelevant cases such as *Joseph* v. *Carter & Weekes Co.*, *supra*, where a state tax was laid on the gross receipts of a stevedore who was loading and unloading vessels engaged in interstate commerce. A tax on an integral part of an interstate movement might be imposed by other States "with the net effect of prejudicing or unduly bur-

dening commerce" as the Court said in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 166.

We have no such problem here. This tax is one imposed on those "prosecuting or attempting to prosecute . . . lines of business in connection with Alaska's commercial fisheries." The business in question is the one specified in subsection (b): "Freezer ships and other floating cold storages." To be sure the tax is computed on the "value" of the fish "bought or otherwise obtained for processing through freezing." That however is the measure of the tax, not the taxable event. The taxable event is "prosecuting" the "business" of "Freezer ships or other floating cold storages." Part of the business is, of course, transporting frozen fish interstate. Yet it is plain that a freezer ship is more—much more—than an interstate carrier. Part of its business is freezing fish. Yet these ships do more than freeze fish and transport them interstate. Taking the fish directly through their own catcher boats or obtaining them from other fishermen is also a part of respondents' business. Without the taking or obtaining of the fish, the freezer ship would have no function to perform.

It is clear that Alaska has power to regulate and control activity within her territorial waters, at least in the absence of conflicting federal legislation. *Skiriotes* v. *Florida*, 313 U. S. 69, 75. That case involved a state law forbidding the use of certain equipment in taking sponges in waters two marine leagues from mean low tide off Florida's coast. We upheld Florida's power to regulate sponge fishing in that manner and in that area, as Congress had not adopted any inconsistent regulation. See also *Toomer* v. *Witsell*, 334 U. S. 385, 393. Alaska's jurisdiction to tax respondents' operations within her territorial waters—whether those activities are taking fish or purchasing fish taken by others—is equally clear. See *Wisconsin* v. *Penney Co.*, 311 U. S. 435, 444; *Ott* v. *Mississippi Barge Line*, 336 U. S. 169, 174.

If the fish were taken or purchased outside Alaska's territorial waters, all of respondents' business in the Bristol Bay area would be beyond Alaska's reach. But since some of the fish in all of the cases before us were taken in Alaska's waters or otherwise acquired there, respondents are engaged in business in Alaska when they operate their "freezer ships." For we know from this record that in this particular business taking and freezing are practically inseparable. Fish are highly perishable and cannot be kept fresh very long even in Alaska's latitude. The process of gathering fish either through the catcher boats that are part of respondents' fleet or through independent operators is a "local activity" (*Michigan-Wisconsin Pipe Line Co. v. Calvert, supra,* 166) in a vivid sense of the term. We see no reason why our cases involving the taking of shrimp (*Toomer* v. *Witsell, supra*) and the extraction of ore (*Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172) are not dispositive of this controversy. The *Oliver Iron* case is indeed a first cousin of the present case. Here, as there, the tax is an occupation tax. Here, as there, the market for the product obtained locally is interstate, the taking being a step in a process leading to an interstate market. In both the local product is promptly loaded for interstate shipment. But in each there is a preliminary local business being conducted—an occupation made up of a series of local activities which the State can constitutionally reach. Catching the fish or obtaining them in other ways from the local market is but an extension of the freezer ship's operations within Alaska's waters.

It is claimed that there was no tax on salmon caught and frozen in Alaska and destined for canning in Alaska and that therefore this law is discriminatory against freezer ships. Alaskan canneries, however, paid a six percent tax on the value of salmon obtained for canning; [2] and local

[2] L. 1949, c. 82, § 1 (a), as amended, L. 1951, c. 113, § 1.

fish processors, which sell to the fresh frozen consumer market, paid a one percent tax.[3] The freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaska canners; and we know from the record that fish canned locally usually are not frozen.[4] When we look at the tax laid on local canners and those laid on "freezer ships," there is no discrimination in favor of the former and against the latter. For no matter how the tax on "freezer ships" is computed, it did not exceed the six percent tax on the local canners. Hence cases such as *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 595–596, which hold invalid state laws that prefer local sales over interstate sales are inapposite. If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so "palpably disproportionate" (*Harvester Co.* v. *Evatt*, 329 U. S. 416, 422) as to run afoul of the Commerce Clause. No "iron rule of equality" between taxes laid by a State on different types of business is necessary. *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117, 119–121; *Morf* v. *Bingham*, 298 U. S. 407, 414; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546–547.

The judgment is reversed. Since we do not know how many fish, if any, were obtained outside Alaska's territorial waters,[5] we remand the cause to the Court of Appeals for proceedings in conformity with this opinion.

Reversed.

---

[3] L. 1949, c. 97, § 1 (a), as amended, L. 1951, c. 116, § 1 (a).

[4] Fish are sometimes frozen for local canneries when the run is more than the canneries can take care of; but that freezing is merely an adjunct of the local canning industry.

[5] Alaska contends that its territorial waters in the Bristol Bay area reach beyond the usual three-mile limit. That is a claim on the merits of which we express no opinion.

SUPREME COURT OF THE UNITED STATES

No. 106.—October Term, 1960.

State of Alaska, Petitioner, v. Arctic Maid, et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 1, 1961.]

Mr. Justice Harlan, dissenting.

It is with reluctance that I have reached the conclusion that this Alaska tax offends the Commerce Clause of the Federal Constitution. (Art. I, § 8, cl. 3.)

The Court of Appeals concluded that the taxable event under this statute is the process of freezing fish aboard ship. 277 F. 2d 120. This conclusion was based on the words of the statute (quoted at p. — of the Court's opinion), the fact that obtaining fish for local sale or consumption is untaxed, and the fact that the present tax "applies whether or not the fish are caught by gill-netters owned by or under contract to appellants." *Id.*, 125–126. Accepting, as I do, this construction of the statute, I agree with the Court of Appeals that a *privilege* tax directed solely at shipboard-freezing, preparatory to interstate shipment, exceeds the limitations the Commerce Clause imposes upon the States, for in its requirement of a license such a tax asserts a power to deny what is a necessary local incident of the right to make interstate purchases. See *York Manufacturing Co.* v. *Colley*, 247 U. S. 21.*

*I also regard the tax as invalid because it in effect charges a toll for the interstate transportation of Alaska's natural resources. See Brown, Justice Frankfurter—The Open Economy, 67 Yale L. J. 219, 232–233.

As I understand the Court's opinion, it seeks to meet this objection by denying that the Alaskan tax is imposed on the privilege of freezing fish aboard ships. It says that the tax is rather upon the local taking or purchase of fish *by or for freezer boats*. But even on this view of the incidence of the tax, I could not agree that the present tax on obtaining fish by or for interstate freezer boats would be constitutional in the given circumstances, for I do not think that Alaska can place a higher tax on the obtaining and freezing of fish for interstate markets than it places on the obtaining and freezing of fish for local markets. See *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 596, 597. As shown in the Court's opinion, under the Alaska scheme of taxation freezer boats which operate solely in interstate commerce, must pay a tax for taking and freezing Alaskan fish for later canning in Washington which is four times that imposed on a local freezer whose product is sold to consumers in Alaska. A shore-based freezer who sells his frozen product to Alaskan canners pays no tax at all.

For these reasons I would affirm the judgment of the Court of Appeals.